COMPLETE TABLE OF CONTENTS WILL BE FOUND ON PAGE III

AMERICAN BAR ASSOCIATION

JOVRNAL

JULY, 1933

Interstitial Legislation by U. S. Supreme Court in Application of Federal Employers' Liability Act

BY EDWIN F. ALBERTSWORTH

A New Experiment in Ratification

BY NOEL T. DOWLING

Lights and Side-Lights on Grand Rapids, Michigan

BY A. P. JOHNSON

Tentative Program for Fifty-Sixth Annual Meeting

Review of Recent Supreme Court Decisions

BY EDGAR BRONSON TOLMAN

A Lawyer Looks at a Lawyer's Training

BY LESLIE CRAVEN

Is the Process Tax Constitutional?

BY KINGMAN BREWSTER

VOL. XIX No. 7

Price: Per Copy, 25c; Per Year, $3; To Members, $1.50
Published Monthly by The American Bar Association at 1140 North Dearborn Street, Chicago, Illinois
Entered as second class matter Aug. 25, 1920, at the Post Office at Chicago, Ill. under the Act of Aug. 24, 1912

Corporate Suretyship *for* Fiduciaries

DOUBTLESS your office is frequently retained as counsel in estate matters. It is necessary in practically every instance that bonds be filed guaranteeing the faithful performance of the fiduciary responsibilities,—whether the appointee be executor, administrator, trustee or guardian.

YOU realize the advantages of corporate suretyship, but possibly some of your clients may not know the dangers incident to asking or giving personal bonds. It is incumbent upon you, therefore, to explain these things to them so that they may avoid all such entangling obligations.

AS a special service to attorneys and fiduciaries the Ætna has prepared a practical, convenient record book designed to simplify and systematize estate and trust fund accounting. If you wish to receive a sample copy please use the coupon.

The Ætna Casualty & Surety Company

affiliated with the

ÆTNA LIFE INSURANCE COMPANY *of* Hartford, Connecticut

The Ætna Casualty & Surety Company
Publicity Department
151 Farmington Avenue
Hartford, Connecticut

I would be glad to receive a samply copy of your "Fiduciary's Record of Estate Transactions" (Form S-1259).

Name .....

.....

.....

Address .....

.....

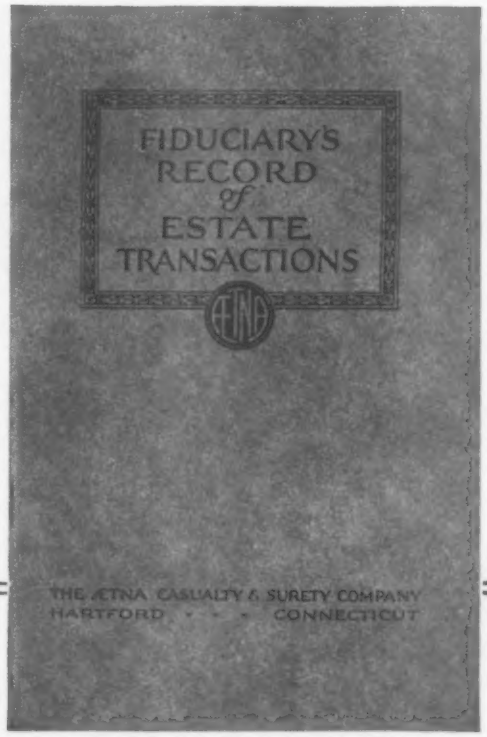

TABLE OF CONTENTS

AMERICAN BAR ASSOCIATION
JOVRNAL

VOL. XIX JULY, 1933 NO. 7

Section Organization and Reorganization

MEMBERS interested in the subjects of International and Comparative Law should attend the reorganization meeting of the Comparative Law Bureau, which will meet on Tuesday, August 29th, at 10:00 o'clock A. M., in Committee Room B, Civic Auditorium at Grand Rapids. At that time proper resolutions will be offered amending the By-Laws of the Section to conform to the proposed amendment to be offered the next day at the meeting, enlarging the work of the Section and taking in the subject of International Law. Those interested in International Law, as well as Comparative Law, are urged to become members of the new Section.

Members should not forget the organization meeting of the new Section on Insurance Law. This meeting will occur on Monday, August 28th, at 11:00 o'clock A. M. and 2:00 P. M. in Room F, Civic Auditorium, Grand Rapids, Michigan. Every lawyer interested in any branch of insurance law should attend this organization meeting.

Complying with the request of certain members of the Association interested in the subject of land title law, there will be held on Tuesday, August 29th, at 10 o'clock A. M. in Parlor B, Pantlind Hotel, a conference to consider whether or not there is sufficient interest in this branch of the law to warrant the organization of a Section of Land Title Law. Those desiring further information or having suggestions to make may communicate with the Secretary of the Association, William P. MacCracken, Jr.

"Constructive Economy in Government"

"REDUCING the Cost of Justice," is the title of one of the programs in the summer "You and Your Government" radio series. Professor Leon Carroll Marshall of the Institute of Law of Johns Hopkins University and Frank J. Loesch, former President of the Chicago Crime Commission, will share the program. They are expected to tell how the taxpayer's money can be saved directly by a simpler and better organized judicial system, and how the elimination of delays and the improvement of the quality of justice will benefit the community economically as well as in other respects.

The summer series, which is entitled "Constructive Economy in Government," will consist of fifteen weekly half-hour broadcasts, every Tuesday evening from June twentieth through September twenty-sixth, at 7:15 Eastern Daylight Saving Time. Glenn Frank, President of the University of Wisconsin, will be the key-note speaker on Tuesday evening, June twentieth. Professor Thomas H. Reed, Chairman of the Committee on Citizen's Councils for Constructive Economy, will share the first program with Dr. Frank, and will explain the purpose of the Citizens' Councils. These programs are closely related to the work of the Citizen's Councils.

Other speakers in this series include Governor Joseph B. Ely of Massachusetts; Governor Albert C. Ritchie of Maryland; Governor William A. Comstock of Michigan; Senator Harry F. Byrd of Virginia; Henry Morgenthau, Jr., Chairman of the Federal Farm Board; Harry B. Mitchell, Chairman of the United States Civil Service Commission; Carl H. Milan, Secretary of the American Library Association; Frank Bane, Director of the American

Public Welfare Association; George McAneny, Commissioner of Sanitation of New York City and President of the Regional Plan Association of New York; Alfred Bettman, President of the National Conference on City Planning; Dr. Kendall Emerson, Acting Executive Secretary of the American Public Welfare Association; Dr. Matthias Nicoll, Jr., Commissioner of Health of Westchester County, New York; Professor A. N. Holcombe of Harvard University; Professor Clyde L. King of the University of Pennsylvania and Chairman of the Public Utilities Commission of Pennsylvania; Dr. John H. Finley, Associate Editor of the New York Times, and a host of other prominent persons in the civic life of this country.

This series of broadcasts, which will be heard over a nation-wide network of the National Broadcasting Company, is presented by the Committee on Civic Education by Radio of the National Advisory Council on Radio in Education and the American Political Science Association, in cooperation with the Committee on Citizen's Councils for Constructive Economy, whose headquarters are with the National Municipal League, 309 East 34th Street, New York City.

Justice Cardozo Given Honorary Degree

THE University of Chicago, at its convocation on June 13, conferred the honorary degree of Doctor of Laws on Justice Benjamin N. Cardozo of the United States Supreme Court. Dean Harry A. Bigelow of the Law School of the University, presented Justice Cardozo and stated that the honor was given "in recognition of his achievements as a judge, as a legal scholar, and as a leader in the adaptation of the law to social needs." In the evening Justice Cardozo gave some of his views on the philosophy of law at the annual banquet of the alumni of the University of Chicago Law School.

Justice Cardozo was also given a similar honor by Harvard University at its recent commencement.

Tribute to Judge John C. Pollock

PUBLIC approval has its value but for the lawyer — judge as well as practitioner — nothing can take the place of appreciation by the fellow members of his profession. That appreciation is intelligent and informed. It comes as a rule only as the result of a career in which the qualities calling for admiration have been fully manifested. It sets a seal on a man that means something.

That seal of definite respect, admiration, approval and affection was certainly set on Judge John Calvin Pollock, of the Federal District Court, by the Bench and Bar at the dinner given in his honor by the Kansas City Bar Association about a year and a half ago. The definite record of that occasion has just been published, in a neatly printed and bound volume, and is now before us. It contains the tributes paid to the Judge, who has served for thirty years on the Kansas Supreme Court and the Federal District Bench—tributes in the form of addresses by members of the Bench and Bar of the Middle West and of telegrams of congratulation from distinguished lawyers and judges —including in the latter Chief Justice Hughes and Associate Justices Van Devanter and Sutherland of the United States Supreme Court.

The dinner and the tributes to Judge Pollock were the result of a bright idea of the Kansas City Bar Association—an organization which seems to have more than its quota of such inspirations. This idea was expressed by the Toastmaster, Hon. T. J. Madden, President of the Kansas City Bar Association, when he said: "We feel that it is more fitting to pay a tribute to him while he is living than to hold a post-mortem. Obituary efforts are the most futile form of human entertainment." The principle was carried out in detail, in the presence of six hundred members of the Bench and Bar.

Judge Pollock's ability, learning and courage in the discharge of his duties were told, and his skill as a duck hunter and his personal charm were not neglected. Even on the printed page something of the atmosphere of the event remains. Mr. Bernard James Sheridan told of "Pollock, the man." Hon. William P. Dillard, of Fort Scott, Kan., gave an intimate personal and professional view of the career of the guest of honor. Judges Orie L. Phillips and George T. McDermott, both of the United States Circuit Court of Appeals, added their tributes, the latter illustrating Judge Pollock's philosophy of law and life from the Judge's own public utterances. Hon. James A. Reed followed in his usual telling style, and then came a brief expression of appreciation from Judge Pollock.

The book is printed because of the desire of the Kansas City Bar Association to preserve in permanent form the tribute paid Judge Pollock. It is also proof that the able and fearless judge is not without honor even in his own country.

Public Meeting of Committee on Commercial Law and Bankruptcy

MR. JACOB M. LASHLY, Chairman of the Committee on Commercial Law and Bankruptcy, sends the following announcement:

"A public meeting has been called and arranged for at the Auditorium in Grand Rapids for the 29th day of August, the day before the annual meeting of the Association, by the Committee on Commercial Law and Bankruptcy. Public discussions will be had and are invited upon the subject of the Corporate Reorganization and the Municipal Bankruptcy measures which have been much debated in Committees of both the 72nd and 73rd sessions of Congress. The agenda will also include a discussion of the studies of the Joint Conferences for the amendment of the bankruptcy laws and other matters of general and public interest in these fields. Those interested in these subjects are invited to attend this meeting."

Oregon Supreme Court Adopts New Rule for Admission

THE state of Oregon, by rules of the Supreme Court adopted April 11, 1933, has prescribed that every applicant for admission to the bar shall be a high school graduate or shall pass "such examination covering his literary training" as the board shall prescribe. The new rules further prescribed that the applicant shall either be a graduate of or

shall have satisfactorily completed a regular course of study at a law school approved by the Court, or else shall have diligently studied law for four years. This leaves only eight states which do not have some requirement of general education for admission to the bar.

Increase in the Professions in Sixty Years

NEARLY ten times as many Americans are now engaged in professional work of various kinds as there were sixty years ago, according to a press summary of the report of The President's Research Committee on Social Trends, recently made public. The advance has been most striking in the newer professions, the number of engineers of all classes having increased more than thirty-fold between 1870 and 1930. The summary continues:

"Changes and increases in the number of Americans occupied in the professions in the last six decades up to 1930 are analyzed in the chapter of the Committee's report entitled 'Shifting Occupational Patterns,' the authors of which are Ralph G. Hurlin and Meredith B. Givens. The chapter is based on statistics furnished by the United States Census.

"Noting the growth in the number of engineers, the chapter states: 'In a special sense the machine age is the creation of the technical engineers, whose numbers, excluding electricians, have increased from 7,000 in 1870 to a total of more than 22,600 in 1930.' Designers, draftsmen and inventors have increased in numbers still more rapidly than the engineers, the authors of the chapter assert. . .

"The number of physicians and surgeons during the period had grown from 62,000 to 160,000, according to the authors who comment: 'Since 1910 the growth of the medical profession has failed to keep pace with that of the population. The relative decline in the number of physicians has been partially offset by the remarkable recent growth of hospital facilities and personnel. The serious aspect of this lag lies, however, in the inadequate geographic distribution of physicians.' Dentists, in the meanwhile, the chapter points out, multiplied in number nine-fold after 1870.

"In the settlement of disputes and in dealing with the many complexities of business, domestic and social affairs the American people now maintain a growing legal profession of more than 300,000 lawyers, judges and others whose services are employed to facilitate the observance or the elucidation of the law. Many other specialties, minor in the numerical sense, have arisen, as for example, the profession of librarian which has attained its present sizeable total of over 30,000 since 1870."

"The group of professional authors grew from inconsequential proportions to a substantial total of 12,000 or 13,000 in 1930, twice the number enumerated in 1920. The nearly 60,000 artists of today may be compared with 4,000 at the beginning of this period, and again the largest part of this increase has come since 1920. The American public now supports 40,000 actors as against 2,000 in 1870, and 165,000 musicians as contrasted with 16,000 in 1870.

"The ten-fold increase of the teaching profession hardly measures adequately the growth in education, since the pressure of the school population upon the supply of teachers and the supply of public funds is a critical aspect of the present educational situation. Of more than 1,000,000 persons now engaged in teaching perhaps 90 per cent are dependent upon employment in the public schools. In 1870 the census of occupations found 84,000 women in the teaching profession; in 1930 there were over 880,000 women listed as teachers and professors including an absolute increase of 230,000 since 1920."

"The President's Research Committee on Social Trends was appointed by President Hoover three years ago to make an appraisal of the nation's changing social life through extensive researches into the shifting social trends of the first third of the Twentieth Century. The Committee's report stresses the long time social problems facing the American people and deals with national policies which will be in process of formulation and reformulation for years to come."

American Members of the Permanent Court of Arbitration

THE recent appointment by President Roosevelt of Professor Manley O. Hudson of the Harvard Law School as American member of the Permanent Court of Arbitration serves as a reminder of the Americans who have figured as members of this Court. The Permanent Court of Arbitration was created by the Hague Conventions of 1900 and 1907 for the Pacific Settlement of International Disputes. It is not really a court but rather a panel of judges, each state party to the conventions of 1900 or of 1907 being entitled to appoint four members. The term of each member is six years and he may be reappointed. States desiring to submit a dispute to arbitration may select from one to five members of the Court to act as a tribunal of arbitration. They may however, select persons who are not members of the Court, and in fact, one American, Chandler P. Anderson, served as a member of a tribunal of the Permanent Court of Arbitration in a dispute between the United States and Norway.

The first Americans appointed in 1900 were Chief Justice Melville W. Fuller of the United States Supreme Court, John W. Griggs, former Attorney-General of the United States, and Judge George Gray of the United States Circuit Court. In 1902, Oscar S. Straus, then Secretary of Commerce and Labor, was appointed to make up the full quota. All of these members continued to serve through reappointment until they died.

Vacancies created by the death of the original members were filled by the appointment of Elihu Root, former Secretary of State, in 1910, John Bassett Moore, Professor of International Law at Columbia University, in 1912, Charles Evans Hughes in 1926, and Newton D. Baker, former Secretary of War, in 1928. In 1929 Mr. Hughes resigned following his appointment as Chief Justice of the United States, though it may be noted that Chief Justice Fuller did not consider his membership on the Permanent Court of Arbitration incompatible with his

position on the Supreme Court. The vacancy created by this resignation was filled by the appointment of Roland W. Boyden, formerly umpire of the United States-German Mixed Claims Commission, in 1930. Shortly thereafter Mr. Boyden died and was succeeded by Robert E. Olds, Under-secretary of State. The death of Mr. Olds in 1932 created the vacancy now filled by the appointment of Professor Hudson. The recent appointment is the second of a professor of law, all other appointees having held judicial office or having been in government service.

Of these ten members of the Court only three served as members of tribunals. In 1904, Chief Justice Fuller sat on the Muscat Dhows Case between Great Britain and France; in 1910 Mr. Gray was a member of the Atlantic Coast Fisheries tribunal in a case involving Great Britain and the United States; and in 1920 Mr. Root served in the Expropriated Religious Properties Case involving Great Britain, Spain and Portugal.

A. H. FELLER.

Chicago Bar Extends Invitation to Visiting Lawyers

THE Chicago Bar Association has asked the JOURNAL to state that it extends a cordial invitation to members of the American Bar Association who may visit the Century of Progress Exposition to make use of its facilities while they are in the city. The attractive home of the Association is conveniently located in the Loop, at 160 N. LaSalle St.

PROPOSED AMENDMENTS

TO THE CONSTITUTION AND BY-LAWS OF THE AMERICAN BAR ASSOCIATION, WHICH HAVE BEEN CONSIDERED AND APPROVED BY THE EXECUTIVE COMMITTEE, TO BE PRESENTED AND ACTED UPON AT THE 56TH ANNUAL MEETING AT GRAND RAPIDS, MICHIGAN, AUG. 30, 1933.

To the Members of the American Bar Association:

Notice is hereby given of the following amendments to the Constitution and By-Laws, proposed by the Executive Committee:

I.

That Article I of the Constitution (entitled "Name and Object") be amended by inserting therein after the word "Nation," the words "express and advocate its views on such questions of public interest or pertaining to the general welfare as it shall deem proper," so that said Article shall read as follows:

ARTICLE I.

NAME AND OBJECT

This Association shall be known as the American Bar Association. Its object shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation and of judicial decision throughout the Nation, express and advocate its views on such questions of public interest or pertaining to the general welfare as it shall deem proper, uphold the honor of the profession of the law, and

encourage cordial intercourse among the members of the American Bar.

II.

That Article VII of the Constitution (entitled "Sections"), Section 1, be amended by striking out the words "Comparative Law Bureau" in the sixth line of said Section, and inserting after the words "Section of Mineral Law" in the tenth line thereof, the words "Section of International and Comparative Law" and "Section of Insurance Law."

III.

That Article XVIII of the Constitution (entitled "Resignation of Members") be amended to read as follows:

"The Executive Committee may reinstate any member who has resigned, on his written application for reinstatement, without reelecting him, if his application is filed within *one year* after the acceptance of his resignation by the Executive Committee."

IV.

That Article II of the By-Laws (entitled "Reports of Committees") be amended by striking out the words "at the beginning of the report" in the fourth line of said Article II, and inserting in lieu thereof the following: "in italics or underscored type or some other form which will readily distinguish them from the body of the report," so that said Article II shall read as follows:

ARTICLE II.

Reports of Committees

Where the report of a committee has been printed, it shall not be read at a meeting of the Association, but if the report recommends action by the Association, the recommendations shall be set forth in italics or underscored type or some other form which will readily distinguish them from the body of the report, and the Chairman of the committee may state briefly to the meeting their substance and the reasons for them.

V.

That Article VIII of the By-Laws (entitled "Committees"), Section 1, be amended by striking out in the list of committees therein the words "On Insurance Law," "On International Law" and "On Memorials, of which the Secretary shall be the Chairman"; by changing the number of members of the Committee on Jurisprudence and Law Reform to 9, and by inserting in the list of committees the words, "On Unauthorized Practice of the Law," so that said Section 1 shall read as follows:

"Section 1. *Appointment and Tenure.* The following committees shall be appointed annually by the President, each to consist of five members (unless otherwise specifically indicated herein), to serve for the year ensuing and until their respective successors are appointed. The President shall designate the Chairman and shall announce the appointments to the Secretary, who shall give notice to the persons appointed.

On Admiralty and Maritime Law;

On Aeronautical Law;

On American Citizenship;

On Commerce;

On Commercial Law and Bankruptcy;

On Communications;

On Jurisprudence and Law Reform, to consist of 9 members;

On Legal Aid Work;

On Noteworthy Changes in Statute Law;

On Professional Ethics and Grievances, to consist of 7 members;

On Publications, to serve for one, two, three, four and five years, respectively, beginning with the members appointed in the year 1924, as then determined by lot, and thereafter the term of appointment, except to fill vacancies by death or resignation, shall be for the period of five years;

On Publicity;

On State Legislation in each state to consist of two members in such state;

On Unauthorized Practice of the Law.

In addition to the aforesaid standing committees, the President shall appoint such special committees as the Executive Committee may authorize, each of such special committees to consist of five members (unless otherwise specifically indicated by the Executive Committee), to serve for one year ensuing" and until their respective successors are appointed, and to perform such duties as the Executive Committee shall prescribe. The President shall designate the Chairman and shall announce the appointments to the Secretary, who shall give notice to the persons appointed.

That Article VIII of the By-Laws (entitled "Committees") be further amended by striking out the whole of Sections 9, 10, and 13, inserting a new Section 17, which shall read:

"Section 17. *Committee on Unauthorized Practice of the Law.* The Committee shall keep itself and the Association informed with respect to the unauthorized practice of law by lay agencies and the participation of attorneys therein, and concerning methods for the prevention thereof. The Committee shall seek the elimination of such unauthorized practice and participation by such action and methods as may be appropriate for that purpose, including cooperation with, and assistance and advice to state, district and local Bar Associations and other organizations." and renumbering all remaining Sections in said Article VIII accordingly, so that said Article VIII shall contain twenty-four sections instead of twenty-six sections.

Proposed Amendment Not Yet Considered by the Executive Committee

And notice is further given of the following amendment to the Constitution proposed by Clarence E. Martin, Martinsburg, W. Va., William P. MacCracken, Jr., Washington, D. C., and John H. Voorhees, Sioux Falls, S. D.

Amend Section 1 of Article IX of the Constitution by adding to the section the following:

"Provided, however, that during the first five years after his original admission to the bar, the dues of a member shall be four dollars per year."

So that said section shall read as follows:

"Section 1. *Amount of Dues.*—Beginning with July first, 1928, each member shall pay to the Association for dues eight dollars for the period of each year from July first to June thirtieth following, payable on July first of each year in advance, which sum shall include the individual subscription of the member to the AMERICAN BAR ASSOCIATION JOURNAL, which is $1.50 per year; provided, however, that during the first five years after his original admission to the bar the dues of a member shall be four dollars per year."

WILLIAM P. MACCRACKEN, JR.,
Secretary.

INTERSTITIAL LEGISLATION BY UNITED STATES SUPREME COURT IN ITS APPLICATION OF FEDERAL EMPLOYERS' LIABILITY ACT

Decisions for Almost a Quarter of a Century Have "Covered Act with a Judicial Veneer of Interstitial Legislation," Resulting in Judicial Interlineation and Interpolation —Such Process Not Necessarily Undesirable from Standpoint of Social Progress or Governmental Science—Actions Under Act as Burdens on Interstate Commerce—Interpolation of Interstate "Transportation" for Interstate "Commerce"—Insulating the Act Against State Interference, etc.

By Edwin F. Albertsworth
Professor of Law, Northwestern University

FOR almost a quarter of a century the United States Supreme Court has been engaged in construing and applying the Federal Employers' Liability Act of 1908. During this period it has covered the Act with a judicial veneer of interstitial legislation,[1] resulting in judicial interlineation and interpolation. This judicial engrafting process has thus given us one law on the statute books, enacted by the Congress, and quite another law in the judicial reports, created by the Court. If we summarized in concise and precise formulae these various decisions, and at the same time literally interlined them within the statutory form itself, taking a photostatic imprint of the resulting network, we would have a startling palimpsest rivaling those of the ancient manuscripts occurring in the ancestry of the Bible. A like rôle in the development of the Federal Constitution by the Supreme Court is mirrored in the almost three hundred volumes of reports, which are the real Constitution from a realistic standpoint.[2] The urge to statutory uniformity among the several States of the Union, whatever other merits it may have, is thus seen to be an illusion, in that its achievement is often circumvented by judicial action of the forty-eight or more highest State courts.[3] In the case of the Supreme Court of the United States, however, and its application of the Federal Employers' Liability Act, there is the advantage of only one tribunal and one statutory enactment, making for greater consistency in decisions in the building process of the statutory skeleton into a living and vital corpus juris.

When it is stated that there has been judicial legislation of profound character by the Supreme Court of the United States in its application of the Federal Employers' Liability Act, it must not be hastily inferred that legislation of this type is necessarily undesirable from the standpoint of social progress or governmental science. For administration of justice is an involved network of functions in a modern community, with constantly shifting human relationships, giving rise to new ganglia of factual situations, so that the interstitial judicial process would appear inevitable from an administrative standpoint in building the statutory nucleus into a functional organism. For no legislative body has sufficient foresight to cover by means of statutory enactment every conceivable situation that may arise;[4] the most it may be able to do is to create the blueprint, leaving to courts, administrative agencies, and enforcement officials the work of erecting the structure itself. Furthermore, when a law has been on the statute books a quarter of a century without substantial modification, like the Federal Employers' Liability Act, during a period of social and economic changes and the widening of the circle of compensatory liability rather than that of negligence for industrial harms, it is not altogether surprising that the Supreme Court of the United States, as the highest tribunal administering this type of statutory relief, should be sensitive to the trend in events and construe accordingly. For by its fulcrum of decisions, the Court has diverted actions under the Act in the direction of State compensation laws, as will hereinafter appear, and in numerous other ways prepared the ground for new legislative premises which must result in congressional repeal of the entire Act itself. For much of the Federal Employers' Liability Act is now uncertain in its meaning, although at the same time the other parts of it are more precise. A review of these decisions of the Court, not by way of exhaustive presentation, but sufficient in number to support the thesis now being advanced, may not be inapropos. The assumption throughout the discussion is that the bench of justices is high-minded and sincere, endeavoring to the best of its ability to develop the Liability Act into a workable corpus juris.

Actions Under the Federal Employers' Liability Act as Burdens Upon Interstate Commerce

The venue provisions of the Federal Employers' Liability Act have received rather singular

1. Mr. Justice Holmes has acquainted the legal profession with the truth that judges do actually legislate. Cf. The Common Law, p. 78. And Mr. Justice Cardozo has emphasized that the judicial function is creation and not discovery, and that the interstices of the law give the courts their greatest opportunity. Cf. The Nature of the Judicial Process, p. 166. And cf. Jordan, Theory of Legislation, ch. XII, p. 449.
2. Cf. "The Federal Supreme Court and the Superstructure of the Constitution" (1930), 16 Amer. Bar Ass'n Journ. 565.
3. Cf. "The Machine-Age Mind and Legal Developments" (1932), 20 Ky. Law Journ. 416.
4. The phenomenal growth in administrative tribunals would appear to be evidence of this truth. Cf. Freund, "Administrative Powers Over Persons and Property," chs. 13-16.

construction by the Court in certain of their phases, giving rise to various queries, one of which is, Has not the Court, realistically regarded, judicially amended or judicially interlined the statute? The brief venue provisions are:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, *or in which the defendant shall be doing business*[5] at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States."[6]

Chief interest attaches to the clause "in which the defendant shall be doing business," for it is in connection with this clause, or situations that should have called for its application, that considerable judicial amendment has occurred. The problem became involved in the first instance by the decision of the Supreme Court in the case of *Davis v. Farmers' Cooperative Company*,[7] decided in 1923, but which case in no way involved construction of the Federal Employers' Liability Act. In this case a statute[8] of the State of Minnesota was held repugnant to the commerce clause of the Federal Constitution, in that the statute permitted a foreign corporation to be sued in Minnesota on a cause of action originating outside the State, even though the business of the corporation consisted only in the solicitation of freight and passenger traffic within the State. The action was brought to recover for loss of grain shipped under a bill of lading issued by the Santa Fe Railway Company in Kansas, where it was also domiciled, for transportation over its line from one point in the State of Kansas to another. Defense to the action showed that to litigate the controversy in a jurisdiction other than that in which it arose would result in added expense to the carrier and loss of service of employés in transporting them as witnesses to defend the action. This argument influenced the Court, Mr. Justice Brandeis writing the opinion, to declare that a "direct burden" upon the interstate commerce business of the carrier was imposed by the Minnesota statute in violation of the Federal Constitution.[9]

The *Davis Case* is significant in that it later became the basis of reasoning by the Court when actions of a transitory nature were brought under the Federal Employers' Liability Act in a jurisdiction remote from their occurrence. Seeking to find a favorable jurisdiction in which to litigate a personal injury or death action against a railroad employer, a plaintiff rail employé or his personal representative might institute the action wherever the defendant was engaged in business far from the place where the cause of action arose. For it is a matter of common knowledge that certain jurisdictions are more liberal in returning verdicts or judgments to plaintiffs in suits of this kind than are other jurisdictions. In the Circuit Court of St. Louis County, Missouri, it appeared that plaintiffs in personal injury actions were quite successful, and it was to this Mecca that litigants were prone to go also to institute causes of action under the Federal Employers' Liability Act. A large reason, probably, for this advantage to plaintiffs was that the Missouri procedure in civil suits permitted a verdict by a concurrence of three-fourths of the jurors instead of all twelve.[10]

Four years subsequent to the *Davis Case*, the Supreme Court had before it, in *Hoffman v. State of Missouri*,[11] a cause of action brought in Missouri by a citizen of Kansas upon a cause of action arising under the Federal Employers' Liability Act in Kansas against an interstate rail employer incorporated in Missouri. Holding that the *Davis* doctrine did not apply because the railway employer was sued in Missouri where it was incorporated, and where it did both intrastate and interstate business, the Court refused to prohibit the Missouri courts from hearing the controversy. It will be noted that this original action was begun in a State court and not a Federal court of the Missouri district. In 1929, however, the Supreme Court had presented to it, in *Michigan Central R. Co. v. Mix*,[12] a state of facts under the Federal Employers' Liability Act practically identical with those in the *Davis Case*. This was an application for a writ of prohibition filed in the State Supreme Court of Missouri against certain judges of the Circuit Court of St. Louis to restrain them from hearing a cause of action originating in Michigan against the Michigan Central Railway. It appeared that one Thomas Doyle, employed as a switchman by defendant railroad, petitioner in this case, was killed in Michigan in the performance of his duties. After his death, his wife moved to Missouri and was appointed administratrix of her husband's estate there. As administratrix, she began her cause of action against the Railway Company under both the Safety Appliance Act and the Federal Employers' Liability Act, alleging negligence of the employer and that the deceased employé met his death while engaged in an act of "interstate transportation" at the time of receipt of fatal injury. It appeared in evidence that the railroad was a Michigan corporation and that no part of its line ran into Missouri. It did, however, solicit freight in Missouri and maintained an office at St. Louis. Alleging restraint upon its interstate commerce if compelled to defend the cause of action in Missouri, the railway company petitioned for a writ of prohibition in the State Supreme Court, which writ was denied. The Supreme Court of the United States, however, Mr. Justice Brandeis again writing the opinion, directed that the writ issue, holding that the *Davis Case* was controlling. The only difference in fact between the two cases was that the administratrix in the *Mix Case* had acquired a residence in Missouri before commencing her cause of action. But this fact, the Court held, did not make reasonable the imposition upon interstate commerce of the heavy burden which would be entailed in trying the cause of action in a jurisdiction remote from where it arose.

With the advent of the *Mix Case*, it will be perceived that the Federal Supreme Court widens the

5. Italics mine.
6. 45 U. S. C. A. §56; Act. Apr. 5, 1910, §143; 36 Stat. 291, §1.
7. (1923) 262 U. S. 312, 43 Sup. Ct. 556, 67 L. Ed. 996.
8. Laws 1913, c. 318, p. 374; Gen. Stats. 1913, §7735.
9. A different problem is presented, of course, where a State attempts to restrict action under a federal statute. Cf. Chicago, M. & St. P. Ry. Co. v. Schendel (1923), 292 Fed. 226; Terral v. Burke Construction Co. (1922), 257 U. S. 529, 42 Sup. Ct. 188, 66 L. Ed. 352.
10. Cf. Cleveland, C. C. & St. L. Ry. Co. v. Shelly (1930), 170 N. E. 338; Ex parte Crandall (1931), 52 Fed. (2d) 650.
11. (1927) 274 U. S. 21, 47 Sup. Ct. 485, 71 L. Ed. 905.
12. (1929) 278, U. S. 492, 49 Sup. Ct. 207, 73 L. Ed. 470.

doctrine of "direct burden upon interstate commerce" resulting from causes of action instituted under the Federal Employers' Liability Act to include acts of private litigants claiming under alleged rights conferred by a federal statute, for the holding in the *Davis Case* concerned a *State statute* and its validity in reference to the commerce clause through permission to sue a foreign corporation in a jurisdiction other than that where the cause of action originated. In the *Mix Case,* no State law whatever was involved; sole authority to bring the action was derived from the federal Act. The cases, on the other hand, have a feature of similarity in that both were suits in State courts in the first instance, and not in federal district courts. But the opinion of the Supreme Court draws no distinction between burdens imposed on interstate commerce by Congress, on the one hand, or by the States on the other. Moreover, no reference is made to the question whether or not these defendants were in either case "doing business"[13] in the jurisdiction where suit was brought. Complete reliance in the opinion is on the interstate commerce effect on the cause of action.

Counsel representing litigants under the Federal Employers' Liability Act have since these decisions been astute to discover some method by which they might be circumvented. Such a decision arose in the case decided last year at the January term. In *Denver & Rio Grande Western Railway Co. v. Terte,*[14] decided January 4, 1932, the whole matter was again up for review by the Court. In this case, one Curtis, employed by both the Santa Fe and Rio Grande Railway Companies, on an interlocking track and signal plant near Pueblo, Colorado, sustained injuries through the alleged negligence of the two railroads while presumably engaged in an act of interstate "transportation" at the time. Before the cause of action was instituted, Curtis became a resident of the State of Missouri. Thereafter, he brought his action under the Federal Employers' Liability Act, joining both parties, in the Circuit Court of Jackson County, Missouri, at Kansas City. The evidence disclosed that the Rio Grande Railroad neither owned nor operated any line in Missouri, but maintained offices for solicitation of traffic. On the other hand, it appeared that the Santa Fe Railroad did operate lines in Missouri. In reaffirming both the *Mix* and *Davis* doctrines, the Supreme Court held that the Rio Grande Railroad Company could not be sued in Missouri, because the cause of action would be a restraint upon its interstate commerce, but that the Santa Fe could be sued in Missouri for the reason that it did operate its road within that State. Hence, the writ of prohibition was directed to issue restraining further proceedings not inconsistent with the opinion. Regarding the device of joining these causes of action, and thus seeking to defeat the application of the doctrine of direct burden on interstate commerce, McReynolds, J., delivering the opinion, said:

"It was not necessary to join the two railroad companies in one action. Whatever liability exists is several. The prohibition against burdening interstate commerce cannot be avoided by the simple device of a joint action. Nor can this be evaded merely by attaching the property of the nonresident railroad corporation. Obviously, the burden and expense which the carrier must incur in order to make defense in a State where the accident did not occur has no relation to the nature of the process used to bring it before the Court."[15]

It may not be impertinent to ask: Since the cause of action arose in Colorado, and it is now held that the suit against one of the tortfeasors will lie in Missouri without burdening its interstate commerce, in that its line of way is there, why is there not just as great a restraint of interstate commerce or a "burden" upon it, to be more exact, by removing from Colorado to Missouri to defend the action, employés who may have been witnesses to the plaintiff's injuries? Nothing is said by the Court in its opinion of this question; the sole test of suability is said to be whether or not it operated a right-of-way within the jurisdiction where the suit was defended. Could not the Court have seized on this difference, rather than upon the fact that the railway maintained its line in Missouri? Or is the Court, with this case, now beginning the erosive process of weakening its prior decisions?

As already stated, there is no indication in these cases what attitude the Court will take to suits under the Liability Act that are originally brought in a *federal* district court, rather than in a State court. Here the Court might say that Congress, under its constitutional powers to fix the jurisdiction of the inferior federal courts, could burden interstate commerce in such fashion as would probably be unreasonable if done by the several States, provided always, of course, that the interstate rail carrier were "doing business" in the jurisdiction where suit was brought.[16] The commerce clause being a grant of power to Congress, and not a restriction, the Court would likely hesitate in holding that its judgment of what was a reasonable restraint on interstate commerce should be given strong, if not controlling, weight. The Court could, of course, find that defendant in the jurisdiction where suit was brought was not "doing business" within the Court's interpretation, and hence refuse to sustain the action on this ground.[17]

On the other hand, it should be noted that the venue provision concerning suit in the district where the defendant is "doing business" relates only to district courts of the United States, the Act being silent with respect to the State courts.[18] However, the Act expressly makes the jurisdiction of the federal courts concurrent with those of the courts of the several States, and it would seem that whatever does not "burden" interstate commerce in the federal courts ought not to burden it in the State courts, and if such a "burden" is sanctioned by the Congress, as appears from other jurisdictional legislation relating to federal courts,[19] the

13. It appears settled that mere solicitation by a foreign rail corporation of freight for its line elsewhere is not "doing business." Cf. Green v. C. B. & Q. Ry. Co. (1907), 205 U. S. 530; Minnesota Commercial Men's Ass'n v. Benn (1923), 261 U. S. 140, 43 Sup. Ct. 293, 67 L. Ed. 573; Thurman v. C. M. & St. P. Ry. Co. (1926), 254 Mass. 569.

14. (1932) 52 Sup. Ct. 152.

15. Supra, note 14, p. 153.

16. E. W. Hinton, "Jurisdiction of a State Court Over a Foreign Railroad Corporation on a Foreign Cause of Action Arising Under the Federal Employers' Liability Act," 24 Illinois L. Rev. 581, 584-585.

17. But cf. Bernard C. Gavit, "Jurisdiction of State Courts Over Causes Arising Under the Federal Employers' Liability Act," 24 Illinois L. Rev. 467, 470.

18. It is probable that the Congress could not compel the State courts to assume jurisdiction over causes of action arising under the Federal Employer's Liability Act. Cf. Douglas v. N. Y., N. H. & H. R. R. Co. (1929), 279 U. S. 377, 49 Sup. Ct. 355, 73 L. Ed. 747.

19. Sec. 24 of the Judicial Code gives the district courts jurisdiction "of all suits and proceedings arising under any law regulating commerce."

Supreme Court ought to reach the same result with reference to causes of action in the State courts. As has been said:

> "The burden on interstate commerce is no greater when the action is brought in a State court than where it is brought in the corresponding federal court, and if that is sanctioned by the Act of Congress there can be no more objection to a suit in the State court than to one in the federal court in the same district."[20]

But the Federal Supreme Court has sought to draw a distinction, if not in its reasoning, at least, in the result reached by the decisions, that Congress may have expressly sanctioned a burden on interstate commerce involved in actions under the Federal Liability Act, but has not done so in respect to actions in the State courts under that Act. However this may be, the result is that the Court has in effect regulated the jurisdiction of the State courts in suits under the Act, doing so by the interstitial process of judicial construction, but at the same time leaving the matter of jurisdiction of the federal courts in similar actions yet to be litigated.[21]

Judicial Interpolation of Interstate "Transportation" for Interstate "Commerce"

Interlineation of the Federal Employers' Liability Act is probably most striking, however, by the manner in which the Court has, under the theory of carrying out the intent of Congress, interpolated the word "transportation" for that of "commerce" as used in the Act. The Act declares[22] that "every common carrier by railroad while engaged in commerce between any of the several States, shall be liable to damages to any person suffering injury while he is employed by said carrier *in such commerce*,"[23] if injury or death resulted in whole or in part from the negligence of the carrier or any of its officers, agents, or employés. The requirement that the injured or deceased rail worker must at the time of receipt of industrial harm be engaged in an act of interstate "commerce" was the direct result of the holding by the Federal Supreme Court in the *First Employers' Liability Cases*,[24] decided in 1908. But in 1916 the Court, by an unanimous vote, in attempting to lay down a test of interstate commerce of the employé within the meaning of the Act, interpolated the statute by judicially inserting the word "transportation" in place of "commerce." This was the leading case of *Shanks v. Delaware, L. & W. Railway Company*.[25] In that case, Mr. Justice Van Devanter, speaking for the Court, said:

> "The true test of employment in such commerce in the sense intended is, was the employé at the time of the injury engaged in interstate *transportation*, or in work so closely related to it as to be practically a part of it."[26]

The only justification which the Court attempted in the *Shanks Case* for substituting *transportation* in place of *commerce*, thus narrowing the statute and excluding numerous rail workers from claiming the protection of the Federal Employers' Liability Act, was to state that Congress had intended to employ the terms "interstate commerce," "not in a technical legal sense, but in a practical one better suited to the occasion." Hence, the finding of the Court in that case was that the injured rail employé not being engaged in an act of interstate transportation while working in a repair shop of the interstate rail employer, could not sue under the Federal Employers' Liability Act. However much he might have been engaged in interstate commerce as one of the numerous links in a chain of interstate commerce of his rail employer, the injured man was none the less denied relief under the Federal Act. His remedy, then, for the industrial harm sustained would, of course, be under State compensation, but for a more restricted sum.[27]

Following the *Shanks Case*, the Supreme Court of the United States applied this broad but vague and uncertain test of interstate "transportation" to numerous factual situations arising under the Federal Employers' Liability Act, with varying results to the injured or deceased rail worker, depending largely on degrees of proximity of the worker with reference to transportation.[28] No predictability was possible in the employment of this test and no further explanation was forthcoming from the Court why it had thus narrowed the plain statement of the statute itself, namely, that the injured or deceased rail worker must be engaged in an act of interstate commerce, rather than interstate transportation. In 1922, however, the Court, in *Industrial Accident Commission v. Payne*,[29] felt that it must further justify the interpolation of the statute more than it had done in the *Shanks Case*. The Court said:

> "The Federal Act gives redress only for injuries received in interstate commerce. But how determine commerce? Commerce is movement, and the work and general repair shops of a railroad and those employed in them are accessories to that movement; indeed, are necessary to it. But so are all departments of the railroad company—official, clerical, or mechanical. Against such a broad generalization or relation we, however, may instantly pronounce, and successively against lesser ones, until we come to the relation of the instrumentalities for a distinction between commerce and no commerce. In other words, we are brought to a consideration of degrees. The test declared is that the employé at the time of the injury must be engaged in interstate transportation or in work so closely related to it as to be practically a part of it. . ."[30]

This apparent justification does not tell us much, but is largely a re-phrasing of the doctrine laid down in the *Shanks Case*. We do, however, get a concept of commerce as movement, which is still an interpolation, in that it greatly restricts the word "commerce." For much commerce, being an interchange of commodities or sale of ideas, has no movement at all; it may result in subsequent movement, or even contemplate movement, but commerce *per se* is more inclusive than transportation. This would seem to be self-evident. Hence, it was necessary

20. Supra, note 16, p. 585.
21. The limits of this discussion do not permit consideration of those decisions of the Supreme Court which protect a foreign corporation under the "due process" clause against transitory causes of action arising outside the State where it is "doing business." Cf. L. & N. Ry. Co. v. Chatters (1920), 279 U. S. 320, 49 Sup. Ct. 339, 73 L. Ed. 711. On the whole matter, consult Note, "Due Process, Jurisdiction over Corporations, and the Commerce Clause," 43 Harvard L. Rev. 1062.
22. 35 Stat. at L. 65, c. 149.
23. Italics mine.
24. (1908) 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297.
25. (1916) 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436. For these and other cases, with annotations, cf. my "Cases on Industrial Law," pp. 136 et seq.
26. Supra, note 25, p. 558.
27. If the federal Act is inapplicable because the rail worker is not engaged in an act of interstate "transportation" at the time of injury, it is not exclusive, and he may sue under state compensation law, where there is one, and provided the statute of limitations has not run. Cf. N. Y. Central Ry. Co. v. Winfield (1917), 244 U. S. 147, 37 Sup. Ct. 546, 61 L. Ed. 1045.
28. For numerous such cases, cf. S. C. Spencer, "What is an Act of Interstate Transportation Under the Federal Employers' Liability Act?" (Law Thesis, Northwestern University); and "Cases on Industrial Law," pp. 165-195. Thornton "Federal Liabilities of Carriers," vol. 2 p. 136-186.
29. (1922) 259 U. S. 188, 42 Sup. Ct. 489, 66 L. Ed. 888.
30. Supra, note 29, p. 195.

to await future explanations from the Court to justify its judicial amendment or interpolation of the express wording of the Act itself.

That there is a substantial difference between the broader meaning of the word "commerce" as employed in the Federal Act, and the narrower term "transportation" as coined by the Supreme Court, is plainly seen in the difference in result reached by the Court, by inadvertently, later, returning to the statutory test and temporarily neglecting to apply the judicial formula. This occurred in two important cases decided by the Court in 1920, which were the occasion of subsequent embarrassment to the Court. These two cases were *Erie Railway Co. v. Collins,*[31] and *Erie Railway Co. v. Szary,*[32] both opinions being written by Mr. Justice McKenna, with Justices Van Devanter and Pitney dissenting, without opinion. In the first case, the injured rail worker was employed to operate a gasoline engine which pumped water into a tank from which interstate locomotives were supplied. In the second case, the injured rail worker was employed in drying sand in a sand house from which interstate locomotives were replenished. The facts, therefore, were substantially identical so far as the question whether or not the rail workmen were engaged in "acts of interstate commerce" according to the federal statute, or "interstate transportation" within the meaning of the *Shanks* doctrine. In both cases, the holding was that the two claimants were engaged in "acts of interstate commerce," with no mention of "interstate transportation." In fact, in these two cases the Court quotes with approval from its prior decision in the *Pedersen Case,*[33] decided in 1913, as follows:

"The true test always is, Is the work in question a part of the interstate commerce in which the carrier is engaged?"[34]

It will be perceived that the judicial test laid down in the *Shanks Case,* requiring transportation instead of commerce, is not mentioned, illustrating the truth that judicial interpolation which departs from the plain statement of the statute that is being applied to a given factual situation has in it the seeds of later difficulty and embarrassment to the Court. For if the test of "transportation" had been employed in these two cases, the inevitable holding must have been to deny relief to the injured rail workmen under the Federal Employers' Liability Act, as will hereinafter appear.

Recently the Supreme Court of the United States, recognizing the error of its ways, as already shown by me in the decisions of 1920, expressly overruled them, restoring the interpolation test originally created by the Court in the *Shanks Case.* The case which thus expressly overruled the 1920 decisions is *Chicago & Eastern Illinois Railway Co. v. Industrial Commission of Illinois,*[35] decided January 4, 1932 . The Court stated in this case that the words "interstate commerce" as used in the 1920 decisions referred to, had been inadvertently substituted for the words "interstate transportation," and that those cases were out of harmony with the general current of its decisions and must, therefore, be overruled. The Court performed this honest act of overruling, rather than distinguishing, because of its decision in the recent case of *Chicago & N. W. Railway Co. v. Bolle,*[36] decided November 23, 1931. In this case the holding was that a fireman employed by an interstate railroad on a locomotive engine used to generate steam for the heating of depots and passenger coaches in the railway yards was not engaged in an act of interstate "transportation" in order to sue under the Federal Employers' Liability Act. Referring to the test laid down in the *Shanks Case,* the Court observed:

"It will be observed that the word used in defining the test is 'transportation,' not the word 'commerce.' The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower significance was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employé at the time of his injury is engaged in interstate commerce within the meaning of the Act, naturally must be whether he was engaged in interstate transportation, or in work so closely related to such transportation as to be practically a part of it. Since the decision in the *Shanks Case,* the test there laid down has been steadily adhered to and never intentionally departed from or otherwise stated. . . The applicable test thus firmly established is not to be shaken by the one or two decisions of this Court where, inadvertently, the word 'commerce' has been employed instead of the word 'transportation.'"[37]

This interpolation by the Court rules out from under the Federal Employers' Liability Act numerous rail workers who otherwise might have claimed under its provisions. For example, a clerk employed by an interstate railway in making out bills of lading for interstate shipments would at the time he is thus engaged probably be performing an act of interstate "commerce," but not one of interstate "transportation." Hence, were he injured or killed through negligence of his rail employer or the latter's servants, or through defective or unsafe conditions of work because of negligence, and thus within the express wording of the Federal Employers' Liability Act, nevertheless because of the narrower construction put upon the act by the Supreme Court, he could not maintain an action. Of course, he could bring a State compensation proceeding, where the recovery would likely be more assured, in that no negligence would be required to be proved as the basis of liability, but where, on the other hand, a smaller sum, rather than a larger one, would be the compensation. Thus, it is quite likely that the large benefit from the Supreme Court's interpolation of the Liability Act will be to open the doors of State compensation to those not engaged in so-called acts of interstate "transportation," although without question performing acts of interstate "commerce;" for the Federal Act being inapplicable in the premises, the *Winfield Case* is likewise not pertinent so as to make the Federal Act exclusively the remedy.[38] Perhaps the interstitial legislation which has resulted in this connection from the Supreme Court's interpolation was really motivated by the desire to make more readily available the remedies of compensation under the laws of the several States which may have Compensation Acts, and thus thereby to restrict the influence of the *Winfield* doctrine at its very source. For the uncertainties of recovery under the Federal Employers' Liability Act, in that the basis of liability is negligence, and not the mere

31. (1920) 253 U. S. 77, 40 Sup. Ct. 450, 64 L. Ed. 790.
32. (1920) 253 U. S. 86, 40 Sup. Ct. 454, 64 L. Ed. 794.
33. (1913) 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125.
34. Supra, note 33, p. 148.
35. (1932) 52 Sup. Ct. 151.
36. (1931) 52 Sup. Ct. 59.
37. Supra, note 36, p. 61.
38. Cf. note 27, supra.

happening of the industrial harm, do not augur well as an industrial injury scheme for the rail worker, compared with the surer results to be obtained under some compensation principle.[39] In other words, it is possible that the Federal Supreme Court, recognizing the harsh results of its holding in the *Winfield Case,* as pointed out by Mr. Justice Brandeis' dissent in that case,[40] is now seeking to neutralize it by restricting the scope of the Federal Employers' Liability Act, but, on the other hand, widening at the same time the avenues of approach to State compensation. If this conjecture is correct, the Court is performing without question the sovereign act of legislation in fact, however much the orthodox contention may be that the Court is but "construing" the statute. Behind the barrage of doctrine lurks a legislative motive, namely, that the Federal Act must be judicially amended to reach results which, on a literal interpretation, would be detrimental to the best interests of injured or deceased rail workers on interstate railroads.

But, on the other hand, this so-called interstitial legislation also has its weaknesses and shortcomings. For it is difficult to see that the substitution by the Court of the word "transportation" for that of "commerce" has made the standard any more precise or predictable in applying it to those new factual situations which are constantly arising in rail employments. Had the Supreme Court followed the statute expressly, it would have probably been simpler to apply the standard, in that acts of interstate "commerce" would seem to be easier of proof than acts of interstate "transportation." In other words, the broader test would seem to be simpler than the narrower. The uncertainties inherent in the standard are by no means removed by the narrower terminology interpolated by the Court. Further new legislative premises would seem to be necessary.

Extent to which State Compensation Laws Have Operative Effect on Interstate Railroads

It has been already stated that the motivation behind some of the Supreme Court's construction of the Federal Employers' Liability Act may be to permit greater latitude to injured or deceased rail workers employed on interstate railroads in prosecuting claims under the compensation laws of the several States where there are such laws in existence. It is further possible that a similar motivation may be found in the attitude of the Court to the application of State compensation laws in the field of interstate rail enterprises where only intrastate acts have originated the industrial harms. The decision in the *Winfield Case,*[41] in 1917, had held that where the Federal Act was applicable, it was at the same time exclusive of any remedy under State compensation law. Thus, the Court may have reasoned that if the Federal Act could be made more restrictive in character, through judicial construction, as by interpolating the word "transportation" for that of "commerce," numerous rail workers could claim State compensation benefits, provided a given State had workmen's compensation, and provided, also, that those laws were not held to be restraints or burdens upon interstate rail commerce. For if State compensation laws could not validly apply in intrastate activities of interstate rail employés, and if Congress itself could not constitutionally enact protective legislation for rail work injuries and deaths in intrastate acts caused by interstate railroads,[42] then there would be a serious *hiatus* in the circle of compensatory relief, or any kind of relief, for industrial harms. Sound statesmanship would thus require a construction of State compensation laws as applied to interstate rail carriers that would accomplish every benefit to rail workers and at the same time avoid every evil. In essence, then, and regarded realistically, legislation was the key to the problem; but as Congress did nothing concerning the matter, judicial legislation resulted.

It was not, however, until last year that the Federal Supreme Court squarely passed upon the problem raised by the application of a State workmen's compensation law within the field of rail work injuries and deaths where the Federal Employers' Liability Act could not reach because of presumed lack of power in the Federal Government, although the well-established practice of procedure had been based on the assumption that such State laws could constitutionally so operate.[43] In *Boston & Maine Railway Co. v. Armburg,*[44] decided March 14, 1932, the question at issue was the constitutional validity of the Workmen's Compensation Law of Massachusetts,[45] as applied to the intrastate activities of interstate rail employés. The State law was challenged as violative of the commerce clause of the Federal Constitution, in that it imposed a burden upon interstate rail commerce even though intrastate acts caused the rail work injuries or deaths. The Massachusetts law exempted in express terms only "masters of and seamen on vessels engaged in interstate or foreign commerce" from the provisions relating to compensation, thus apparently on its face applying even to railroad employés of interstate roads engaged in acts of interstate commerce or "transportation" at the time of receipt of industrial harm. However, the State court construed the law as inapplicable to subjects outside the State's jurisdiction, which included rail employés of interstate railroads while engaged in so-called acts of interstate commerce, but held the law applicable and valid with respect to the intrastate acts of such employés. The Federal Supreme Court, affirming this judgment, further qualified the Massachusetts law by stating that it likewise could not extend to employés "whose service constitutes at the same time intrastate and interstate commerce."

The Supreme Court's opinion, in the *Armburg Case,* is largely declarative and affirmative without advancing juristic grounds for its holding, except

(*Continued on page* 426)

39. Cf. Gregory Hankin, "What Will Be Done About the Federal Employers' Liability Act?" 49 The Railway Trainman, 472.
40. And see further, W. K. Clute, "Conflict of Two Ideals of Social Justice" (1929), 15 Amer. Bar Ass'n Journ. 235.
41. Supra, note 27.
42. As decided by the Court in the First Employers' Liability Cases, supra, note 24. Since the personnel of the Court has substantially changed since the date of those cases, and in view of the fact that several important decisions have been handed down by the Court, apparently departing from the narrower viewpoint of federal power as enunciated in the First Employers' Liability Cases, it has been argued that perhaps now the Court would sustain a federal statute without requiring that the interstate commerce employe be actually engaged in an act of interstate commerce. Cf. W. G. Rice, Jr., "Constitutionality of Labor Legislation in the United States," 14 Int. Labor Rev. 619, 636.
43. See the cases collected by me in "Cases on Industrial Law," pp. 135-185.
44. (1932) 52 Sup. Ct. 236.
45. (1932) Gen. Laws, ch. 153.

DEPARTMENT OF CURRENT LEGISLATION

A New Experiment in Ratification

By Noel T. Dowling
Professor of Law, Columbia University

A NEW job was thrown into the laps of state legislatures last February when Congress specified, in the Resolution proposing the repeal of the Eighteenth Amendment, that ratification should be by conventions in the several States. The Constitution had never been amended in that way before. True, the Constitution itself was adopted by conventions, but all twenty of the Amendments were ratified by legislatures. No legislation existed, state or national, for calling constitutional conventions of the particular type now contemplated. Nor was anything to be found on the subject in state constitutions. Silent, too, was the Federal Constitution. So, the present proposal was projected into a perfectly clear legal field: not a constitutional provision, not a statute, not a decision—nothing specifically in point—either to guide or to warn.

Something more was involved than the repeal of the Eighteenth Amendment, important as that in itself might be. Here was the beginning of a new experiment in government, perhaps of great significance for the future operation of the American system. A different method of amending the Constitution was to be tried out.

Thirty-nine States so far have enacted statutes to provide for such conventions.[1] The provisions of these statutes are well known, especially as they bear upon the prohibition problem. But in the effervescence over beer today and the prospect of something stronger tomorrow, notice is scarcely being taken of the fact that this current crop of legislation contains a goodly portion of permanent measures for action upon other amendments by the convention method. A few more than half the statutes are concerned specifically and solely with the pending amendment, with repeal and nothing more; but the others are so framed as to take care of not only this but of *any* amendment which may hereafter be proposed.

Irrespective, however, of the type of statute under which the States proceed, the experiment will have an important bearing upon the method of effecting further changes in the basic governmental structure. At least, with the knowledge gained from the present experience we can make an intelligent choice hereafter between the two available methods of ratification. By taking stock of what the legislatures have done, we can secure an estimate now, based on the more or less independent action of the States, of how the convention method should be carried out; and the happenings of the next few months will show how it works in fact.

An initial controversy, and a congressional debate thereon, over the question where lay the power—in Congress or in the States—to provide for calling the conventions threatened for a time to delay not only the submission of the amendment but the formulation of convention plans. But in spite of the strong contention in favor of a national prerogative, the Resolution as finally adopted contained no assertion of power by the Congress concerning the manner of calling or conducting conventions. It had the bare requirement that ratification shall be by conventions in the several States. Upon the States, consequently, is devolved the whole responsibility. That may or may not be where the Constitution contemplates that it should be. At all events and for the time being at least, upon the States it is.

And the States, in spite of the advance notice contained in platform pronouncements of both major political parties in favor of the convention method, generally were caught unprepared. But they moved quickly. Indeed they were set off into a veritable "race to ratify" by the sudden and unexpected action of Congress in adopting the Resolution. The sweep of legislation which followed has been remarkable in its range and speed. Incidentally, a clear demonstration has been given of what can be accomplished, even in legislation of a novel character, when the objective is definite and the public insistent.[2]

Setting the stage for conventions was no easy task. A variety of questions had to be dealt with by the States beforehand. Aside from a few of an inevitable political complexion, the more important of these questions, and the ones of wide public interest, were concerned with, first, the method of electing the convention delegates, and second, the extent of deliberative power to be vested in the convention. The former involves, in the main, considerations of policy, while the latter takes us into the fringe at least of constitutional difficulties. In both, the answers disclose similarity enough to indicate what may be tentatively accepted as the principal aspects of a typical plan of ratification by conventions.

Method of Electing Delegates

First in importance—certainly in its influence on the fate of the pending amendment—stands the question: How shall the delegates to the conventions be elected, by statewide vote or by local districts? Such a question, calculated as it is to inject the gerrymandering issue immediately into the matter, served to bring on sharp preliminary skirmishes in several States. At bottom was the

1. To Jouett Shouse, Esq., President of the Association Against the Prohibition Amendment, I am indebted for the advance copies of the statutes.

2. Also, there has been a striking illustration of how the legislative development of the law may be advanced by private organizations. Shortly after Congress proposed the amendment, draft bills to provide for conventions were submitted for legislative consideration by the Voluntary Committee of Lawyers, chiefly through the efforts of Joseph H. Choate, Jr. These bills had an immediate and substantial effect upon a large part of the legislation which followed.

assumption that rural districts might be counted as safely dry. Depending on how the districts were made up, the drys might even secure a majority of delegates. In any event there would be a chance of a split delegation, as against a solid slate one way or the other on a wholly state-wide vote, with the result that the question of ratification would go to the convention floor. The convention floor, however, was not the arena in which the wets desired to have the decision made. Democrats and Republicans alike had declared in favor of "truly representative" conventions, and steadily the idea gained ground that only by a state-wide vote (and then with instructed delegates as an added feature) could such a convention be had. So, on the issue of state-wide *versus* local election the first contests were fought out.

An additional factor contributed to these contests. Election at large, for all delegates, involves a break-away from prior notions concerning the composition of conventions. The idea of local representation permeates our political thinking and possibly is to some extent imported into the Constitution by the term "convention." Nearly half the state constitutions contain specifications about constitutional conventions, though, to repeat, none of them touches upon conventions of the particular type with which we are now concerned. Some provide for a convention composed of delegates elected locally, others for a combination of local and state-wide. The combination plan has been used frequently in recent years, sometimes (as in New York) because the local constitution so required, and sometimes (as in Massachusetts) because the legislature thought it the better policy. The New York Convention (1913) included 15 delegates at large and 3 from each senatorial district. Massachusetts (1916) had 16 at large, 64 from congressional districts and 240 from legislative districts. I have found none composed solely of delegates elected at large. The more common constitutional provision is that delegates be selected to the same number and in the same manner as members of the more numerous branch of the state legislature.

But even if there is such a break-away, the state-wide plan does not seem open to constitutional objection. No compelling reason is apparent why the conventions now proposed should be like the conventions for revising state constitutions. Different functions are to be performed. State conventions are essentially deliberative bodies. They are called for the purpose of considering what should be done in the way of changing the existing constitutional framework, and it is their function to formulate what shall be submitted to the people for acceptance or rejection. In the present situation, the comparable deliberative action has already been taken by the Congress and what is now before the people is essentially the same as the issue which would be put after a state constitutional convention had adjourned, namely to accept or reject what is proposed.

In most of these initial contests the state-widers prevailed. A convention composed entirely of delegates elected at large is the preponderant, but by no means universal, plan. Twenty-two States have adopted it. In numbers of delegates they run all the way from 3 in New Mexico to 150 in New York. On the other hand, thirteen States have decided upon conventions made up wholly of local delegates—*e.g.*, Arkansas with 75 from as many counties and Michigan with 100 elected in the same manner as members of the assembly. A third scheme, a combination of some elected at large and some locally, has been adopted in four States. In this group there are wide variations not only in the size of the conventions but in the ratio between the two classes of delegates; and further, considerable diversity respecting the districts to which the local elections shall be confined. Thus, in New Jersey, 64 delegates elected at large, 162 by counties; in Maryland, 6 at large and 18 by congressional districts (3 from each).

So much for the manner of election. As to that, the States have felt free to proceed as they pleased, Delegates at large, some or all, will appear in most of the conventions.

Delegates Bound by Instructions

Hardly less in importance than the question just considered and closely related to it is the further question: How much power shall be vested in the convention? Or, to put the same thing another way: Shall the delegates be instructed how to vote and provision made for enforcing the instructions? Still again: Shall the election of delegates be made the occasion for determining, with legal finality, the question of ratification or rejection? Here the States have not had such easy going. They have not been free from constitutional difficulties.

As a complement of state-wide elections the suggestion was put forth that the voters should have a clear choice between candidates in favor of or opposed to ratification of the proposed amendment. This would be accomplished by having separate slates of candidates on the ballots, one slate "for" and the other "against" ratification. Whether delegates so elected would vote conformably to their "platform" could well be left, it was believed, to their moral sense and political prudence. For all practical purposes and even with some allowance for a revival of the political trickery so long associated with the regulation of the liquor traffic, the whole matter would be settled at the polls. The convention would tend to become a formal proceeding to give final effect to the popular vote.

Such a plan is both simple and sensible. It has the analogy of the electoral college procedure in its favor. And kept within reasonable bounds it can be easily effectuated. In their zeal, however, to make the popular vote legally binding and conclusive on the delegates, some of the States have run dangerously close to the constitutional line.

The trouble springs from the fact that the Constitution as it stands today makes no allowance for amendment by popular vote. In the course of the campaign to ratify the Eighteenth Amendment Ohio attempted a state-wide referendum on the question of ratification or rejection. Such a referendum was an appropriate proceeding under the Ohio constitution which expressly provides that the people "reserve to themselves the legislative power of the referendum on the action of the General Assembly ratifying any proposed amendment to the constitution of the United States." The legislature had voted to ratify, and a referendum was called for in accordance with the Ohio law. Thereupon, a taxpayer's suit was instituted to en-

join the expenditure of public money in the preparation and printing of ballots for the referendum. The case against the referendum was unsuccessful in the state courts, successful in the Supreme Court of the United States. *Hawke v. Smith* (1920) 253 U. S. 221.

The Supreme Court held that the Ohio courts had "erred in holding that the State had authority to require the submission of the ratification to a referendum." The determination of the method of ratification, said the Court, "is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods: by action of the Legislatures of three-fourths of the states, or conventions in a like number of states. . . The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation." Consequently, continues the Court, "the only question really for determination is: What did the framers of the Constitution mean in requiring ratification by *'legislatures'?* That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation." Accordingly it was held that a state-wide referendum, even though it be legislative in character, cannot be substituted for the action of the *legislature*, "the representative body which made the laws of the people."

Similarly here, it may be asked: What did the framers of the Constitution mean in requiring ratification by *conventions?* As to personnel, the meaning appears to be elastic enough to include delegates elected at large. But as to the power which the delegates may exercise—that is another question. How much freedom of deliberation must the assemblage of delegates possess in order to be a convention in the constitutional sense? How nearly can it be made a formal proceeding and still comply with constitutional requirements? What, if any, are the constitutional requirements?

That some deliberative power must be possessed is clear. Possibly this is true under the ordinary definition of "convention." At any rate, the Supreme Court has said, in the case quoted from above, that whether ratification is being effected by legislatures or conventions it must be "by deliberative assemblages representative of the people." I take the result to be that a delegate must be free to decide how he individually will vote, to ratify or not to ratify; that he must not be subject to any legal process either to compel him to vote in a given way or to punish him if he does not so vote. A delegate may "sell out" or otherwise disappoint the voters who elected him. That, however, is a risk attendant upon the exercise of a power, whether in conventions or in legislatures.

Most of the statutes reserve some such freedom to the delegates. At the same time they disclose a common purpose to make the popular vote as nearly binding as possible. In nearly all States candidates must be nominated without party or political designation and on the basis of "for" or "against" ratification of the proposed amendment. Varying degrees of pressure are then brought to bear to hold the delegate to vote in accordance with his platform. Thus, most States require the candidate to file a written acceptance of the nomination, "for" or "against," as the case may be. Several require, in addition to the written acceptance, a pledge that the candidate, if elected, will vote agreeably to his platform; others go further and specify an oath to that effect, while at least one prescribes a criminal penalty for the disobedient delegate. A few States make the convention vote turn upon the result of a referendum, in an apparent effort to relieve the individual delegate of responsibility.

The danger of going too far in attempting to bind the delegates is illustrated by the statutes of several States. In Alabama, for example, the convention will consist of 116 delegates, 10 to be elected at large and all others by counties. Before any person can qualify as a candidate he must take an oath (no mere pledge or personal commitment will do) that, if elected, he will "abide" by the result of a state-wide referendum, to be conducted in connection with the election, on the question of ratification or rejection. Such an oath is required of every candidate, at large and local alike, whatever may be his publicly announced convictions on the question at issue. The oath, it will be observed, does not restrict his running; does not curtail his campaign performance; does not prevent his being just as dry or wet as he desires. But it does control his vote. So, under cover of this law, a campaigning dry candidate may wake up the morning after election to find that he is a voting wet delegate. More than that, he may be sent up as a local delegate by a dry county only to vote for a wet State. Or the opposite. The point is, that the oath plus the referendum levels the delegates all off to the same plane. Whether the convention will be all for or all against repeal is thus settled long before it meets. Once met—no differences, no doubts; no occasion for debate, no excuse for delay. A predetermined result.

Governor Miller vetoed the Bill on the ground that it provides "not for a Convention which under the Federal Constitution would be a deliberative body to decide whether or not the Amendment should be ratified, but for a referendum." "It would be unnecessary," he continued, "to hold any Convention and all that would be needed under the Bill would be to have the vote counted and the result announced. This does not comply with the provisions of the Federal Constitution which requires action either of a Convention or of a Legislature as Congress may order; in this case, the action of a Convention." But his veto was overridden and the bill became law.[3]

Arkansas runs Alabama a close second. To get his name on the ballot, a candidate must swear to a statement that he is "for" or "against" the proposed amendment, as the case may be; but there is no requirement that he be designated on the ballot as "for" or "against," nor is there any indication of what effect his oath will have thereafter. He

3. The validity of the law was sustained in an Advisory Opinion by the Supreme Court of Alabama on May 10. The Court suggests that a convention "is more truly representative when expressing the known will of the people," and adds:

"Keeping in view the fundamental doctrine of a government of the people, by the people and for the people, we are unable to see in the Federal Constitution any purpose to prohibit a direct and binding instruction to the members of the convention voicing the consent of the governed.

"Deliberation upon the matter is to be had beforehand and direct advice of the result given to the members of the convention. The voter holds somewhat of delegated power and duty; the power and duty to act for those lacking in maturity in governmental affairs."

CONVENTIONS TO RATIFY THE PROPOSED PROHIBITION AMENDMENT

State and Date of Statute	Date of Election	Date of Convention	Delegates			Candidates	
			Total	At Large	Local	"For" and "Against"	"Unpledged"
Ala. (Mar. 28)	July 18, 1933	Aug. 8, 1933	116	10	106	Yes	No
Ariz. (Mar. 18)	Proclamation	28th day after election	11	11		Yes	No
Ark. (Mar. 24)	July 18, 1933	Aug. 1, 1933	75		1 for each County	Yes	No
Calif. (April 21)	Proclamation	40th day after election	22	22		Yes	No
Colo. (Bill Vetoed)							
Conn. (May 2)	Proclamation	Proclamation	50	15	1 from each Sen. Dist.	Yes	No
Del. (April 11)	May 27, 1933	June 24, 1933	17	17		Yes	Yes
Fla. (Bill Pending)							
Ga. (Leg. Adj. No Act.)							
Idaho (Mar. 13)	Proclamation	28th day after election	21	21		Yes	No
Ill. (April 28)	June 5, 1933	July 10, 1933	50	50		Yes	Yes
Ind. (Mar. 8)	June 6, 1933	June 26, 1933	329		By Counties	Yes	No
Iowa (April 10)	June 20, 1933	Proclamation	99	99		Yes	No
Kan. (Leg. Adj. No Act.)							
Ky. (Leg. meets 1934)							
La. (Leg. meets 1934)							
Maine (March 31)	Sept. 11, 1933	Dec. 6, 1933	84		By Counties	No	Yes
Md. (April 5)	Sept. 12, 1933	October 18, 1933	24	6	18 (3 for each Cong. Dist.)	Yes	Yes
Mass. (April 20)	Proclamation	Proclamation	45		45 (3 from each Cong. Dist.)	Yes	No
Mich. (March 11)	April 3, 1933	April 10, 1933	100		By Rep. Dists.	Yes	No
Minn. (April 4)	Sept. 12, 1933	October 10, 1933	21	21		Yes	No
Miss. (Leg. meets 1934)							
Mo. (April 13)	Proclamation	Proclamation	2 for each Sen. Dist.	All		Yes	No
Mont. (Mar. 17)	Next general or by Proclamation	1st Mon. in Mo. following election	Not less than 1½ Gen. Assembly		By Counties	Yes	No
Nebr. (May 2)	Nov. 6, 1934	Dec. 4, 1934	100		By Rep. Dists.	Yes "May publicly declare" for or against.	Yes
Nev. (Mar. 25)	May 27, 1933	Sept. 5, 1933	40		By Counties		
N. H. (May 7)	June 20, 1933	Proclamation	10	10		Yes	No
N. J. (Mar. 23)	May 16, 1933	June 1, 1933	226	64	162	Yes	Yes
N. M. (Mar. 13)	Sept. 19, 1933	Nov. 2, 1933	3	3		Yes	No
N. Y. (April 6)	May 23, 1933	June 27, 1933	150	150		Yes	Yes
N. C. (May 10)	Nov. 7, 1933 (Referendum on Question of Convention)	Dec. 6, 1933	120		By Counties	Yes	No
N. D. (Leg. Adj. No Act.)							
Ohio (Mar. 23)	Nov. 7, 1933	Dec. 5, 1933	52	52		Yes	No
Okla. (Bill Vetoed)							
Oregon (Mar. 15)	July 21, 1933	Proclamation	1 for each 10,000 Pop.		By Counties	Yes	No
Penn. (May 3)	Municipal election, 1933	28th day after election	15	15		Yes	No
R. I. (April 4)	May 1, 1933	May 8, 1933	31	31		Yes	Yes
S. C. (May 9)	Nov. 7, 1933	Dec. 4, 1933	46	46		Yes	No
S. D. (Mar. 8)	Next general (Nov. 6, 1934)	Jan. 17, 1935	Same as Legis. Reps.		By Rep. Dists.	Yes	No
Tenn. (Mar. 31)	July 20, 1933	August 11, 1933	63	63		Yes	Yes
Texas (Bill Pending)							
Utah (Mar. 22)	Proclamation	28th day after election	21	21		Yes	No
Va. (Leg. meets 1934)							
Vt. (April 13)	Sept. 5, 1933	Sept. 18, 1933	14	14		Yes	No
Wash. (Mar. 20)	Proclamation	Proclamation	1 for each Rep. Dist.		By Rep. Dists.	Yes	No
W. Va. (April 11)	June 27, 1933	July 25, 1933	20	20		Yes	Yes
Wis. (—)	April 4, 1933	April 25, 1933	15	15		Yes	No
Wyo. (Feb. 18)	May 15, 1933	May 25, 1933	65		By Counties	No	Yes

NOTE: The foregoing table has been compiled on the basis of information from unofficial sources, the official texts of the statutes being available in only a few cases. Dates fixed by proclamation for elections and conventions are supplied mainly by press reports.
Florida and Texas (listed above as with Bills Pending) have completed their legislation since the table was compiled, but the details of the statutes are not yet available except that in both States the delegates will be elected at large.

swears what he is, not what he will do. If he receives the highest number of votes in his county (the convention consists of one delegate from each of the seventy-five counties) he is entitled to "sit" in the convention. Under another provision in the statute, the ballot must carry the question of repeal or no repeal to be voted on separately, and the returns on this question are tabulated for the whole State and certified to the convention immediately upon its being convened. Thereupon, declares the statute, "the convention shall cast the vote of the convention for whichever side" of the question a majority of the total number of votes was cast. That's all there is to it. It seems quite in order for the statute to add that the convention shall "immediately adjourn."

Arizona joins Alabama and Arkansas, to make an alliterative association, all apparently bent on exposing themselves to as much unnecessary constitutional trouble as possible. This State, eschewing a referendum *per se*, proceeds to put the proverbial teeth into the law wherewith (taking the word from a recent writer in another connection) to masticate the delegate who violates his platform pledge. He "must" vote at the convention, says the statute, in accordance with such pledge. But suppose he doesn't? A triple answer comes straight from the law: first, he is guilty of a misdemeanor; second, his vote will not be considered; third, his office will be deemed vacant. In this summary fashion, the State takes the recalcitrant delegate out of the convention picture and remits him to penal proceedings appropriate to his misdemeanor. But more important, from the point of view of convention action, the way is made clear for filling the vacancy with a delegate more agreeably disposed to observe the voters' instructions.

Law suits are invited by statutes of the character just described. There is the possibility that in Alabama and Arkansas the referendum may be enjoined, as it was in the Ohio case. Of course, the statutes might be held to be separable (though it

will necessitate a bold piece of judicial surgery to accomplish that result in Alabama) so that the part providing for election of delegates could be saved, even if the part relating to the referendum be lost. Further, in the event that an injunction suit is not brought against the holding of the election or the assembling of the convention, it may be that no court would go back of the certification of the ratification, and that the State would be counted as one of the requisite thirty-six to ratify.

As against these attempts to bind the delegates to a pre-determined vote, some States have thrown specific safeguards around the deliberative aspect of the conventions. Thus, the requirement, as in Maryland, or the permission, as in Tennessee, that there be three slates of delegates, one "for," one "against" and one "unpledged." Under such a plan it is possible, but not at all likely, that the convention would be composed, at least where the vote is for delegates at large and no others, entirely of delegates unpledged as to how they would vote. In a very few States—*e.g.*, in Maine, there will be no slates at all: merely the election of a specified number of delegates. Even so while the statutes require no designations of "for" or "against," the candidates may individually commit themselves. States with such statutes as these furnish the nearest approach to a fully deliberative convention.

Such have been the answers in the States to the main questions, how to elect the delegates and how to control the conventions. Judged by the results in the few States in which the plans so far have been put to the test, they seem well designed and satisfactory in their operation. Michigan, as a pioneer with a convention composed wholly of local delegates, Wisconsin, blazing the trail with an all-at-large delegation, and New Jersey, trying out for the first time a tandem team of local and at-large delegates, have all come through without mishap or undue confusion. As far as the election of delegates is concerned, the ground is pretty well cleared.

Hardly so much can be said in respect of nominations. In that area, indeed, political considerations have been the source of many difficulties and delays; and the schemes to provide for nomination of delegates are just about as heterogeneous as the political influences in the several States. A provision common to many of the statutes provides that nominations shall be by petition and that no more nominees shall be deemed to be qualified on a given slate than the number of delegates to be elected. Qualifying candidates are selected on the basis of those having the greatest number of signatures on the petitions.

As the States successively and successfully go to the polls in these elections something more probably is being settled than that the state plans really will work. What is transpiring will have its influence on the constitutional controversy mentioned at the beginning of this paper concerning national against state power to provide for the calling of such conventions. With the merits of that controversy I was never particularly concerned. Neither side made, and I doubt whether either side could make, a conclusive case. One thing at least is clear: the Constitution does not contain an explicit answer. Another thing is so nearly certain that it could be counted on: any reasonable construction by Congress would be accepted by the Supreme Court.

So, in choosing to leave the whole matter to the States, Congress was giving its interpretation of the Constitution. There is no suggestion that Congress intended to assert any power other than that specifically mentioned in the Constitution, namely, to designate whether the amendment should be ratified by legislatures or conventions. It would have been easy to frame such an assertion—*e.g.*, a declaration by Congress that the delegates should be elected and the conventions held in accordance with the laws of the States. State laws in such an event might have been deemed applicable, not by their inherent force, but by reason of the will of Congress.

But though Congress was silent, there is ample evidence that the States contemplated the possibility even of delayed congressional action on the subject. In twenty or more statutes a section appears—and most of the sections are substantially the same—to the effect that if Congress does prescribe the manner in which the conventions shall be constituted and doesn't make an exception of States which have already acted, then the state Act "shall be inoperative" and state officers are authorized and directed to act in obedience to the federal statute "as if acting under a statute of this State."

As against such amicable acquiescence, however, one State, New Mexico, offers the militant declaration that "Any attempt on the part of Congress in any manner to prescribe how and when the delegates to the convention may be nominated or elected, the date on which said convention shall be held in the several states, the number of delegates required to make a quorum, and the number of affirmative votes necessary to ratify the amendment submitted to such conventions, or any other requirements, shall be null and void in the State of New Mexico, and all officers of the State, or any sub-division thereof, are hereby authorized and required to resist to the utmost any attempt to execute any and all such congressional dictation and usurpation."

Washington Letter

1266 National Press Bldg.,
Washington, D. C., June 10, 1933.

General Orders in Bankruptcy

ON May 15, 1933, the Supreme Court of the United States promulgated the following order:

"ORDER LI.

"The General Orders in Bankruptcy heretofore promulgated by this Court are amended by including therein a new order, numbered LI, to be immediately effective, and reading as follows:

"'No ancillary receiver shall be appointed in any District Court of the United States in any bankruptcy proceeding pending in any other District of the United States except (1) upon the application of the primary receiver, or (2) upon the application of any party in interest with the consent of the primary receiver, or by leave of the court of original jurisdiction, or a judge thereof. No application for the appointment of such an ancillary receiver shall be granted unless the petition contains a detailed statement of the facts showing the necessity for such appointment, which petition shall be verified by the party in interest, or the primary receiver, or by an agent of the party in interest or primary receiver specifically authorized in writing for that purpose, and having knowledge

of the facts. Such authorization shall be attached to the petition.'"

"May 15, 1933."

An Act to Amend Section 1025 of the Revised Statutes of the United States

On May 18, 1933, the President approved Public No. 16, providing:

"That section 1025 of the Revised Statutes of the United States be, and the same is hereby, amended so as to read as follows:

"'Sec. 1025. No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, or by reason of the attendance before the grand jury during the taking of testimony of one or more clerks or stenographers employed in a clerical capacity to assist the district attorney or other counsel for the Government, who shall, in that connection, be deemed to be persons acting for and on behalf of the United States in an official capacity and function.'"

Limiting Jurisdiction of the District Courts

On June 6, 1933, Senator Norris, from the Committee on the Judiciary, submitted a favorable report (S. Report No. 125) on S. 752, introduced by Senator Johnson, to amend Section 24 of the Judicial Code as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to orders of state administrative boards.

A minority report (Report No. 125—part 2) was filed on behalf of Senators Stephens and Austin, who reported unfavorably and recommended that the bill be not passed.

This bill is practically the same as S. 3243, introduced during the 72d Congress, and when it was introduced at the 73d Congress and referred to the Senate Judiciary Committee, that Committee referred it to a subcommittee composed of Senators Norris (Chairman of the subcommittee), Stephens, Black, Van Nuys and Austin. The subcommittee submitted a favorable report to the full committee, but on application of several parties who desired to be heard, the full committee referred the bill back to the subcommittee with directions to hold hearings.

A hearing was held on May 26 in the Senate Judiciary Committee room at which Hon. Clarence E. Martin, President of the American Bar Association, and Honorable J. Harry Covington, Chairman of the Committee on Jurisprudence and Law Reform of the Bar Association, appeared. The views of the American Bar Association in opposition to the proposed legislation were presented by Mr. Edward W. Everett of Chicago, Illinois, a member of the Committee on Jurisprudence and Law Reform.

The hearing was printed by the Senate Judiciary Committee for distribution and is entitled "Limiting Jurisdiction of Federal Courts."

In the majority report written and presented by Senator Norris, it is stated that the bill has been considered by the Committee on the Judiciary in two Congresses. The report states: "One cannot escape the conclusion that those who are opposing the bill are resorting to tactics that can have but one effect, and that is to delay final action by the Congress. The American Bar Association was given full opportunity to express its ideas at the first hearings. Nothing new was presented at the subsequent hearing. It was simply a rehashing of the old argument made over and over again, but by waiting until the Committee on the Judiciary was about to act, and then securing a third reference of the bill to a subcommittee, with directions to hold hearings, those opposed to the bill succeeded in delaying action until it is undoubtedly impossible to get action at the present session of Congress."

The following is the purpose of the bill, according to the majority report:

"This bill has for its object the taking away of jurisdiction of Federal district courts to enjoin, suspend, or restrain the enforcement of any order of an administrative board or commission of a State or to enjoin, suspend, or restrain any action is compliance with such order, where the jurisdiction is based solely upon the ground of diversity of citizenship, or where jurisdiction is claimed on an alleged repugnance of such order of such board to the Constitution of the United States, and where such order affects the rates chargeable by a public utility, does not interfere with interstate commerce, and has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy is provided for by the laws of the State."

Senator Norris quoted at length from the report made on S. 3243 during the previous Congress where he cited the case of Great Northern Utilities Co. v. Public Service Commission of Montana, which case, he stated, was not an isolated one. In that case the Supreme Court upheld the judgment of the State Court. "It is a demonstration," says Senator Norris, "that this claim of 'prejudice' on the part of State judges and State officials does not exist and that such claim is simply a sham and a delusion."

Under the heading, "the real objections and the real objectors," the report, speaking of the removal of cases to Federal courts from State courts, says:

"An examination of the testimony taken before the subcommittee of the Judiciary Committee will show that some of the witnesses very honestly and frankly admitted that this was a 'privilege' they had always possessed and they wanted to retain it. There is no doubt but that it is a privilege of great value. When a citizen of one State goes into another State and engages in business in the other State, under the laws of that State, and he gets into a controversy with a citizen of that State, why should he not be required to submit his controversy to the courts of that State, the same as every citizen thereof is compelled to do? This privilege of having the choice of going into one of two different courts is not only of great value, but it is often of extreme hardship and detriment to the other party to the litigation."

According to the report, litigation in Federal courts is more expensive than in State courts and there are many places in the United States where litigants must travel several hundred miles to attend the place of trial if they are sued in Federal court.

The report cites again the case of Black and White Taxi Co. v. Brown and Yellow Taxi Company, 276 U. S. 518, as an example of a corporation organizing in a state other than that in which it does business for the purpose of gaining an "unfair advantage" by going into a Federal court in litigation.

It is again urged that the present law makes property rights more valuable than human rights and that the passage of this legislation would tend to give relief of the Federal courts from congestion. A quotation is made from an article by Honorable Felix Frankfurter, professor of law in the Harvard Law School, entitled "Distribution of Judicial Powers between United States and State Courts," contained in the Cornell Law Quarterly for June, 1928, and from a letter written to Honorable Paul Howland by Honorable Charles E. Clark of the Yale University School of Law.

After citing the cases of Kline v. Burke Construction Company (260 U. S. 226) and Turner v.

Bank of America (4 Dall. 8), the report states that "it is perfectly clear that this bill cannot be successfully attacked on constitutional grounds" because "so far as the jurisdiction of inferior courts is concerned, Congress can give such jurisdiction within the limits of the Constitution as it pleases and, having thus given jurisdiction, it is likewise within the power of Congress to take it away either in whole or in part."

The minority report lists the following objections to the bill:

"(1) The bill is discriminatory.

"(2) It is a step toward abolition of Federal courts.

"(3) It is unnecessary if a stay of the order complained of is granted by State court; Judicial Code, section 266, then has the same effect as the proposed bill.

"(4) States which choose to surrender the protection of Federal jurisdiction may do so by passing a stay-order statute similar to that passed by Nebraska, Wisconsin, Arizona, and New York.

"(5) Other States ought not to be compelled by Congress to surrender that asset.

"(6) The bill could result in a denial of a review of the facts found by the State courts.

"(7) Pending litigation, a confiscatory order could destroy a utility because of lack of a stay.

"(8) A stay should be provided for to do justice to all parties in interest.

"(9) No sufficient showing of abuse in existing procedure has been made which would justify the removal of the existing protection of property which the Constitution gives, and which the bill would remove.

"(10) The development of utilities in all States has depended upon the protection of the Federal courts against confiscatory rate orders; millions of individuals and many eleemosynary corporations, life insurance companies, and savings banks now hold the securities representing that development; the bill would remove this protection and therefore impair investments and retard future development.

"(11) Service of the public would consequently be injuriously affected by the passage of this bill. The consumer suffers when the utility is injured."

The bill, according to the minority report, "picks out a narrow class of citizens and deprives them of privileges and immunities, to which all citizens in the several states are now entitled" and if passed, "great injustice would be done to the utilities and their investors by taking away from them their right to seek protection in the Federal courts."

The claim of the proponents of necessity to relieve Federal courts of congestion is without merits for two reasons:

"1. The number of cases where Federal Courts have been called upon to enjoin orders of State regulatory bodies is insignificant. . . Moreover, it must be acknowledged that the State courts are also congested.

"2. Relief from congestion should not be obtained by the destruction of valuable rights in important litigation. . .

"Another reason for not passing this bill is found in the difference in the scope of review by the Supreme Court of the United States when a case comes up from State courts rather than from Federal courts. The importance of the facts found is reflected in the opinion of Mr. Justice Holmes in the case of Prentis v. Atlantic Coast Line (211 U. S. 210, L. C. 228):

"'If the railroads were required to take no active steps until they could bring a writ of error from this court to the Supreme Court of Appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent.'

"The limitation in practice of review of facts found in a State court is a positive disadvantage to untrammeled administration of justice as compared with the original trial of issues of fact on equity petition for injunction, or such review of facts as may be had upon writ of certiorari or by appeal, in the Federal courts.

"Since the stated object of the bill could be accomplished, in all States which desire such object, by means of State statutes, without the destruction of rights, and without the beginning of the breakdown of the jurisdiction of Federal courts in other States which appreciate those rights, and desire to preserve them, this bill should not be approved."

Securities Act of 1933

On May 27th, the President approved Public No. 22, to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.

The act provides for the registration of securities with the Federal Trade Commission under the terms of the act and such rules and regulations as may be promulgated to carry out its provisions. Certain securities and transactions are exempted from the operation of the act. Unless a registration statement is in effect as to a security, it shall be unlawful to make use of any means or instrument of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or to carry or cause to be carried through the mails or in interstate commerce, by any means or instrument of transportation, any such security for the purpose of sale or delivery after sale.

A filing fee of one one-hundredth of 1 per centum of the maximum aggregate price at which such securities are proposed to be offered is required and the effective date of the registration statement is the twentieth day after filing, unless the Commission refuses to permit same to become effective. If untrue statements or omission of material facts are found to exist, the Commission may by a stop order suspend the effectiveness of the registration statement.

Review of the orders of the Commission may be had in the Circuit Courts of Appeal or the Court of Appeals of the District of Columbia within 60 days after the entry of the order.

Complete data must be filed in triplicate in accordance with the requirements of the thirty-two paragraphs of Schedule A of the Act in so far as securities are other than those of a foreign government, and in the latter case the data called for in Schedule B must be furnished.

In the event of an untrue statement or of failure to state a material fact to make the registration not misleading, any person acquiring the security may sue the signers of the statement, or the directors, partners, underwriters, and every accountant, engineer or appraiser, or any person whose profession gives authority to a statement made by him, to recover the consideration paid or for damages if he no longer owns the security.

"The district Courts of the United States, the United States courts of any Territory, and the Supreme Court of the District of Columbia shall have jurisdiction of offenses and violations under this title and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial Courts, of all suits in equity and actions at law brought to enforce any liability or duty created by the title. . . No case arising under this title and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

One who violates the act shall be subject, on conviction, to a fine of not more than $5,000, or imprisonment for not more than five years, or both.

LIGHTS AND SIDE-LIGHTS ON GRAND RAPIDS, MICHIGAN

By A. P. Johnson
Educational Director, Grand Rapids Furniture Exposition

GRAND RAPIDS, MICHIGAN, to which the American Bar Association turns for its next annual meeting, August 30, 31 and September 1, is a city of 178,000 people, situated in the western center of the lower Michigan peninsula and famed for its prominence in two distinct realms of renown. It is familiarly known as "The Furniture Capital of America," by reason of its influence upon the best in household artistry, and it has come to be regarded as the gateway to one of the greatest playgrounds of the nation; that limitless stretch of romantic, scenic and life-invigorating outdoors that surrounds the city in all directions and extends north to the Straits of Mackinac.

In all probability, there is no city in the United States which enjoys a greater diversity of attractions. In the summer, it becomes a Mecca of thousands of nomads who trek through its streets on their way to air, water and sunlight. As such, it resolves itself into a caravansary for those who play, who have thrown care to the winds, who seek freedom and surcease from the pressures of economic responsibility. Its other self, equally attractive to numbers, is its mastery in a great industrial art, that of creating, displaying and disseminating things that make for comfort and beauty in the home. Other thousands journey to Grand Rapids continuously—some twice, others four times a year—to keep abreast of all that is new in home beautification.

Grand Rapids was founded in 1826 by Louis Campau, a descendent of the Picardy Campaus who came to Montreal in the seventeenth century. He is regarded in Grand Rapids much as is Father Knickerbocker in New York, Father Dearborn in Chicago and as the people in Philadelphia look back upon Benjamin Franklin. He was at once an adventurer, a trader and philosopher, charged with the restlessness of the pioneer and ably equipped to trade with the Chippewas, Ottawas, Pottawattomies and Wyandots who dwelt in the great Grand River valley and looked upon him as "the white man who kept his word."

The formative days of Grand Rapids differed little from those of all mid-western cities which found their origin in the fur trade and grew out of the soil or through the natural products of the land. For a few years, the French language was used as much as the English. In fact, one Harriet Burton, writing her reminiscences years later, quotes Louis Campau as saying he did not "talk Yankee" very well in those early days.

It was not until 1833, when surveys of public lands had been made, that Grand Rapids began to take on the atmosphere of an American village. Groups of settlers, some from the east, others emigrating from European countries, were attracted to the village largely through the speculative fever which spread over the central west during the land boom of 1836 and 1837. The land, according to a couple of bachelor farmers who came to "look things over," was only "middlin' good," but the people wouldn't have a market half as good as Boston in a hundred years. In fact, aside from being a community necessarily limited by the agricultural and trading activities of its surroundings, no one as late as 1840 would have ventured a future for Grand Rapids much beyond 2,000 population.

Between 1840 and 1850, however, Grand Rapids received its first industrial inspiration in the establishment by several cabinet-makers of shops where hand-made furniture was produced. It is significant that even in those early days the furniture made in Grand Rapids was best known for its quality. Deacon Haldane, Archibald Salmon and Enoch W. Winchester, followed by the Mathers, Widdicombs, Berkeys, Footes, Sligh and Irwins, are names which may not mean much to the casual reader of these reflections, but they are as significant in the American furniture industry as are those of the Goulds and Vanderbilts in railroading, that of Carnegie in steel or the Guggenheims in copper.

Often has the question been asked, how did it happen that Grand Rapids became a furniture center? It was not in its beginning and is not now situated with any particular advantage either as to raw material or market. It has none of the exceptional facilities of large centers in traffic or distribution. Nor can it be said that the city is renowned for the volume of its production. Much more furniture originates in Grand Rapids than is ever produced there.

The answer lies largely with the aforementioned patriarchs of the industry. Early in its history, Grand Rapids received a rich accretion of skilled workmen, mostly from the Germanic countries of Western Europe and from England. Coincident with their immigration came a coterie of shrewd and sound traders from New England and the east. The two types had much in common, the predominating traits being conservatism and a highly developed natural integrity. Whatever the artisan made and the trader sold had to be the best. Anglo-Saxon enterprise coupled with Dutch frugality, established a slow but sound process of building in the furniture industry, a process which was reflected in the growth and development of the city.

The quality of its product and the continued drift of furniture thought toward Grand Rapids soon earned for the city a renown which best is described by the title it received, "The Furniture Capital of America." Furniture being a commodity that readily cannot be transported as samples, it early became a custom among retail merchants to journey to furniture centers, there to make their

AERIAL VIEW OF DOWN-TOWN GRAND RAPIDS

Courtesy Grand Rapids Association of Commerce.

purchases from the displayed stocks of the manufacturers. More and more such buyers came to Grand Rapids during the seventies, with the result that other manufacturers of furniture came to Grand Rapids to display their wares. The first furniture exhibition, or market, was held in Grand Rapids in 1878 and proved so successful that manufacturers in other cities determined it would be to their advantage to have displays of their furniture at semi-annual markets. And thus was established what is now known as the Grand Rapids Furniture Exposition, an organization which exercises the largest single influence upon all quality furniture made and distributed throughout the United States.

The members of the American Bar Association and their wives are invited to view this display during their forthcoming visit to Grand Rapids. Manufacturers and exhibitors of furniture will place at their disposal all the display facilities of the Exhibition, with proper guides to give such information as to style and value of furniture as will give the visitor an intelligent evaluation of the subject.

Although furniture and furniture production, with its kindred and related activities, such as woodworking machinery, material, finishes and, not to overlook the largest contingent of furniture designers in the country, constitute by far the largest combined industry of Grand Rapids, the city has many other qualities and attractions of interest to a convention visitor.

In its civic structure it enjoys the distinction of being the first city in its class in the Union in the number of individually owned homes. For a number of years it was surpassed in home ownership by Des Moines, Iowa, which ceded its leadership to Grand Rapids in 1930. It was among the early cities in the country to adopt the commission-manager form of government and conducts its schools, library and museum through non-political boards which have kept these institutions at an exceptionally high standard. Its Public Library, founded in 1871, has become a model in the serving of the community with educational material and contains among its more than 300,000 volumes the largest individual collection in existence of books relating to the furniture arts and crafts.

No survey of Grand Rapids would be complete without reference to its ethical and artistic life, as reflected by its educational institutions, its cultural

pursuits and spiritual ideals. The greater number of its people being engaged in an industry which pursues its course largely through artistic channels, there is a corresponding reflection of artistic thought in the institutional life of the community. Its public school system is one of the best and largest in cities of its class. The uniform excellence of its school buildings and the comprehensive plan upon which they have been erected; the large percentage of the city's children who attend and graduate from high schools; the equally high percentage of public school graduates who carry on their studies in higher institutions of learning, have combined to place the city in the forefront of enlightened progress.

In the realm of the pure arts, the David Wolcott Kendall Memorial School, a gift to the community by the late Mrs. Kendall in memory of her artist husband, is a school of art where the fundamental principles of drawing are taught to students of talent. Its courses of study are laid along the most rigorously accepted lines of classical procedure, on the theory that every artist first should learn to draw. Courses of study at the Kendall school are recognized by all universities and full credit given to its students. David Wolcott Kendall, from whom the school is named, was himself a distinguished artist and student and one of the foremost of furniture designers in America.

Calvin College and Seminary, owned and conducted by the Christian Reformed Church, is an inspirational contribution both to the educational and spiritual life of Grand Rapids. The college, which enjoys a high rating of its graduates among the higher educational institutions of the country, gives a completely rounded course of academic schooling leading to an A. B. degree in the general collegiate course and an A. B. degree in education. The college also has a pre-law course, pre-engineering and pre-medical. The seminary is distinctly a divinity school and requires an A. B. degree for entrance. Its students graduate for the most part into pastorates of the Christian Reformed Church.

The highest civic asset of which Grand Rapids rightfully may boast, is a city-owned Auditorium recently constructed at a cost of more than $1,500,000. It is this structure, a marvelously complete edifice for large gatherings, that makes possible the forthcoming meeting in Grand Rapids of the American Bar Association. The building is of modern design built upon classical lines. All facilities of proven success in other structures of this type have been incorporated in the Grand Rapids Civic Auditorium which is a model of its kind among all existing convention and assembly halls. Its main auditorium measures 170 feet wide by 175 feet long, seating comfortably 5,700 people. A high achievement in acoustics makes the human voice heard without difficulty in all parts of the room, which, however, is equipped with sound amplification whenever such devices are necessary. The auditorium has twenty-six double entrances and may be filled or emptied in an incredibly short time.

The building also has a concert hall auditorium, seating approximately 1,000 people, stage equipment in both the main and concert halls, numerous committee and small assembly rooms and an exhibition hall 232 feet by 175 feet, making approximately 40,000 square feet of usable exhibition space, which when desired can be changed into a large dining room. The woodwork throughout the entire building is of the particular excellence for which Grand Rapids is noted and forms of and by itself one of the main attractions of the structure.

TENTATIVE PROGRAM FOR THE ASSOCIATION'S FIFTY-SIXTH ANNUAL MEETING

Wednesday Morning, August 30, at 10 o'clock
Civic Auditorium

Address of Welcome.
Response to Address of Welcome.
Annual Address by the President of the Association.
Announcements.
Report of Secretary.
Report of Treasurer.
Report of Executive Committee.

Wednesday Afternoon, August 30, at 2:30 o'clock
Civic Auditorium

Address. (Speaker and subject to be announced.)
Statement concerning the work of the American Law Institute, William Draper Lewis, Director.

REPORTS OF SECTIONS

Comparative Law Bureau, Charles S. Lobingier, Washington, D. C.
Conference of Bar Association Delegates, David A. Simmons, Houston, Texas.
Criminal Law, Justin Miller, Durham, N. C.
Judicial Section, John M. Grimm, Cedar Rapids, Iowa.
Legal Education and Admissions to the Bar, John Kirkland Clark, New York City.
Mineral Law, D. J. F. Strother, Welch, W. Va.
Patent, Trademark and Copyright Law, Jo Baily Brown, Pittsburgh, Pa.
Public Utility Law, Lovick P. Miles, Memphis, Tenn.
National Conference of Commissioners on Uniform State Laws, William M. Hargest, Harrisburg, Pa.

Wednesday Evening, August 30, at 8 o'clock
Civic Auditorium

Address. (Speaker and subject to be announced later.)

10:00 o'clock
Pantlind Hotel

Reception by the President of the Association.

Thursday Morning, August 31, at 10 o'clock
Civic Auditorium

Address. (Speaker and subject to be announced.)

REPORTS OF COMMITTEES

American Citizenship, F. Dumont Smith, Hutchinson, Kansas.

International Law, James Grafton Rogers, Boulder, Colo.

Jurisprudence and Law Reform, J. Harry Covington, Washington, D. C.

Uniform Judicial Procedure, George W. McClintic, Charleston, W. Va.

Federal Taxation, Silas H. Strawn, Chicago, Ill.

Judicial Salaries, Alexander B. Andrews, Raleigh, N. C.

Admiralty and Maritime Law, Braden Vandeventer, Norfolk, Va.

Commerce, Rush C. Butler, Chicago, Ill.

Publicity, Walter H. Eckert, Chicago, Ill.

Memorials, William P. MacCracken, Jr., Washington, D. C.

Thursday Afternoon, August 31, at 2 o'clock

Civic Auditorium

Address. (Speaker and subject to be announced.)

REPORTS OF COMMITTEES

Aeronautical Law, John C. Cooper, Jr., Jacksonville, Fla.

Communications, John W. Guider, Washington, D. C.

Professional Ethics and Grievances, Arthur E. Sutherland, Rochester, N. Y.

Canons of Ethics, Charles A. Boston, New York City.

Unauthorized Practice of the Law, John G. Jackson, New York City.

Practice of Law in District of Columbia, William C. Sullivan, Washington, D. C.

Commercial Law and Bankruptcy, Jacob M. Lashly, St. Louis, Mo.

Thursday Evening, August 31, at 8:30 o'clock

Civic Auditorium

Address. (Speaker and subject to be announced later.)

Friday Morning, September 1, at 10 o'clock

Civic Auditorium

Address. (Speaker and subject to be announced.)

REPORTS OF COMMITTEES

International Bar Relations, John H. Wigmore, Chicago, Ill.

Coordination of the Bar, Jefferson P. Chandler, Los Angeles, Calif.

Insurance Law, A. T. Vanderbilt, Newark, N. J.

Legal Aid Work, Reginald Heber Smith, Boston, Mass.

Change of Date of Presidential Inauguration, L. Barrett Jones, Jackson, Miss.

Noteworthy Changes in Statute Law, Joseph P. Chamberlain, New York City.

Friday Afternoon, September 1, at 2:00 o'clock

Civic Auditorium

Address. (Speaker and subject to be announced.)

Administrative Law, Louis G. Caldwell, Washington, D. C.

Facilities of the Law Library of Congress, James Oliver Murdock, Washington, D. C.

Federal Judicial Appointments, John W. Davis, New York City.

Award of American Bar Association Medal.

Election of Officers.

Miscellaneous Business.

Friday Evening, September 1, at 7:30 o'clock

Annual Dinner of the Association.

Among the speakers who have accepted invitations to address the Association are:

The Attorney General of the United States.

Dr. Leonide Pitamic, Envoy Extraordinary and Minister Plenipotentiary of Jugoslavia.

Hon. P. J. McCarran, Member of Senate Judiciary Committee.

Hon. John J. Parker, Judge of Circuit Court of Appeals of the Fourth Circuit.

Program assignments of these and additional speakers will appear in the next JOURNAL.

Tentative Programs of Committees, Sections and Other Organizations

Special Committee on Unauthorized Practice of the Law

Room C, Auditorium

Tuesday, August 29, at 2:00 P. M.

John G. Jackson, Chairman, presiding.

Consideration of "Commercial and Credit Agencies and their Relation to the Practice of the Law."

Speakers to be announced later.

General Discussion.

Standing Committee on Commercial Law and Bankruptcy

Room A, Auditorium

Tuesday, Aug. 29, 10 A. M.

Detailed program will be announced later.

Comparative Law Bureau

Parlor A, Pantlind Hotel

Tuesday, August 29, 1933

1:00 P. M.

Meeting of Council.

2:00 P. M.

Meeting of Bureau.

Conference of Bar Association Delegates

Concert Hall, Auditorium

Monday, August 28, 1933

Morning Session, 10:00 o'clock

David Andrew Simmons, Chairman, presiding.

Address by Chairman.

Debate: Best Method of Judicial Selection.

This debate will have four sides; one speaker will present one each of the following (a) executive appointment; (b) direct election by the people; (c) bar association primaries; (d) other methods of selection. The speakers will be announced later.

Discussion by the delegates of Methods of Judicial Selection.

Committee Report:

Judicial Selection, A. V. Cannon, Cleveland, Ohio.

Luncheon, Pantlind Hotel.

Afternoon Session, 2:00 o'clock

Concert Hall, Auditorium

Committee Reports:

Cooperation Between the Press and the Bar, Andrew R. Sherriff, Chicago, Illinois.

Bar Integration, Carl V. Essery, Detroit, Michigan.

State and Local Bar Activities, Morris B. Mitchell, Minneapolis, Minnesota.

Accident Litigation, Henry S. Drinker, Jr., Philadelphia, Pennsylvania.

Bar Reorganization, Robert H. Jackson, Jamestown, N. Y.

7:00 P. M.

Colonial Room, Pantlind Hotel

Annual Dinner for Members of the Conference and the American Judicature Society, ladies and guests.

Section of Criminal Law

Colonial Room, Pantlind Hotel

Tuesday, August 29, 1933

2:00 P. M.

Justin Miller, Chairman, presiding.

Report of Chairman.

Report of Secretary.

Report of Committees on:

a. Cooperation with American Law Institute.

b. Cooperation with American Legislators' Association.

c. Cooperation with American Prison Association.

d. Cooperation with International Association of Chiefs of Police.

e. Criminal Procedure.

f. Medico-Legal Problems.

g. Mercenary Crime.

h. Cooperation with American Psychiatric Association.

i. To Examine and Report upon the Code of Criminal Procedure, Drafted by the American Law Institute.

Two addresses on the Institute Code—speakers to be announced.

8:00 P. M.

Report of Committee on Personnel in the Administration of Criminal Justice.

Two speakers to be announced upon the subject of Personnel in the Administration of Criminal Justice.

Judicial Section and National Conference of Judicial Councils

(Joint Meeting)

Room F, Auditorium

Tuesday, August 29, 1933

10:00 o'clock A. M.

John M. Grimm, Chairman of the Judicial Section, presiding.

Address of Welcome by Hon. Arthur J. Tutt'e, Judge of the United States District Court, Detroit, Michigan.

Response by Hon. Edward R. Finch, Vice-Chairman, Presiding Justice of the Supreme Court, Appellate Division, First Department, New York City.

Address by Professor Samuel Williston, Harvard Law School, "The Judge and the Professor."

General Discussion of the following subjects:

1. Waiver of juries in civil and criminal cases.
2. Oral or written instruction to the jury.
3. Less than unanimous verdicts.

2:00 o'clock P. M.

Edson R. Sunderland, Chairman of the National Conference of Judicial Councils, presiding.

Detailed program to be announced later.

7:00 o'clock P. M.

Annual Dinner for Members, Ladies and Guests.

Section of Legal Education and Admission to the Bar

Veterans' Room, Civic Auditorium

Tuesday, August 29, 2:00 P. M.

John Kirkland Clark, Chairman, Presiding.

Address by the Chairman.

General Discussion of the subject "What Constitutes a Good Legal Education."

Speakers to be announced later.

Section of Mineral Law

Room G, Civic Auditorium

Tuesday, August 29

10:00 A. M.

D. J. F. Strother, Chairman, Presiding.

Reading of Minutes.

Disposition of Routine Matters.

Appointment of Nominating Committee.

Address by Hon. Pat Malloy, Assistant Attorney General of the United States, "Taxation in Industry."

Report of Nominating Committee.

2:00 P. M.

Report of Committee on Conservation of Mineral Resources.

Detailed Program to be announced later.

Section of Patent, Trademark and Copyright Law

Directors' Room, Civic Auditorium

Monday and Tuesday, August 28 and 29, 1933

Jo Baily Brown, Chairman, presiding.

Sessions will be held at 10:00 A. M. and 2:00 P. M. each day and reports of Section Committees and new matters that may be brought up will be presented and considered.

Tuesday, August 29, 7:00 P. M.

Kent Country Club

Annual Dinner for members, ladies and guests.

Section of Public Utility Law

Veterans' Room, Civic Auditorium

Monday, August 28, 9:00 A. M.

Meeting of Council, Pantlind Hotel.

First Session, 10:00 A. M.

Lovick P. Miles, Chairman, Presiding.

Address of Welcome. (Speaker to be announced.)

Address by Chairman Lovick P. Miles, Memphis, Tennessee.

Report of Standing Committee to Survey and Report as to Developments during the Year in the Field of Public Utility Law. Leslie Craven, Duke University, Durham, N. C., Chairman.

Address: "Regulation by Conference," Nathaniel T. Guernsey, New York, N. Y.

Discussion of Report and Addresses.

Discussion will be opened by Hon. David E. Lilienthal, Madison, Wisconsin.

Airplane View of Omena Bay, Leelanau Peninsula, West Michigan. Easily reached over Michigan Scenic Highway 22, which connects with U. S. 31 at Honor.

Courtesy Talbert Abrams; negative by A.B.C. Airline Corp.

Second Session, 2:15 P. M.

Address. (Speaker to be announced later.)

Report of Special Committee to Report upon the Extent to which the States and the Federal Government respectively may Regulate Contract Carriers on the Highways and Waterways. E. J. Jouett, Louisville, Kentucky, Chairman.

Discussion of Address and Reports. Discussion will be opened by Kenneth F. Burgess, Chicago, Illinois.

New Business.

Adjournment.

Tuesday, August 29

Third Session, 10:00 A. M.

Address. (Speaker to be announced later.)

Report of Committee to Report on the Regulation of Holding Companies and of the Relations between Holding Companies and Affiliated Operating Companies. Henry G. Wells, Boston, Mass., Chairman.

Report of Committee to Report on Legal Aspects Involved in Cases where the Utility Charges Different Rates for Different Classes or Kinds of Service, Certain of which Result in a Loss or Inadequate Profit. William L. Ransom, New York City, Chairman.

Discussion of Address and Reports. Discussion will be opened by Harry J. Dunbaugh, Chicago, Illinois.

Report of Nominating Committee and Election of Officers.

New Business.

2:00 P. M.

Golf, Blythefield Country Club. Putting and bridge for the ladies.

7:00 P. M.

Blythefield Country Club

Annual Dinner for members, ladies and guests. Dancing.

National Conference of Commissioners on Uniform State Laws—Forty-third Annual Meeting

Ball Room, Pantlind Hotel

Tuesday, August 22, to Monday, August 28, inclusive, 1933

Tuesday, August 22

9:00 A. M.

Meeting of Executive Committee.

10:00 A. M.

First Session of Conference:

1. Address of Welcome.
2. Response Thereto.
3. Roll Call.
4. Reading of the Minutes of Last Meeting.
5. Announcement of Appointment of Nominating Committee.
6. Statement of the President.
7. Report of the Treasurer.
8. Report of the Secretary.
9. Report of the Executive Committee.

2:00 P. M.

10. Reports of Standing Committees:
a. Legislative.
b. Public Information.
c. Appointment of and Attendance by Commissioners.
11. Reports of General Committees:
a. Legislative Drafting.
b. Uniformity of Judicial Decisions.
12. Reports of Sections:
a. Uniform Commercial Acts Section.
b. Uniform Property Acts Section.
c. Uniform Public Law Acts Section.
d. Uniform Social Welfare Acts Section.
e. Uniform Corporation Acts Section.
f. Uniform Torts and Criminal Law Acts Section.
g. Uniform Civil Procedure Acts Section.
13. Report of Committee on Amendments of Uniform Commercial Acts.
14. Report of Committee on Uniform Bank Collection Act.
15. Report of Committee on Uniform Letters of Credit Act.
16. Report of Committee on Uniform Sale of Securities Act.
17. Report of Committee on Uniform Stock Transfer Act.
18. Report of Committee on Uniform Trade-Mark Act.
19. Report of Committee on Uniform Trust Receipts Act.
20. Report of Committee on Uniform Acknowledgment of Instruments Act.
21. Report of Committee on Uniform Estates Act.
22. Report of Committee on Uniform Intestacy Act.
23. Report of Committee on Uniform Presumption of Death Act.
24. Report of Special Committee on Uniform Land Registration Act.
25. Report of Committee on Uniform Automobile Liability Security Act.
26. Report of Committee on Uniform Acts Comprising the Motor Vehicle Code.
27. Report of Committee on Uniform Act Regulating Motor Busses and Trucks.
28. Report of Special Committee on Uniform Act for Compacts and Agreements Between States.
29. Report of Special Committee on Uniform Aeronautics Acts.
30. Report of Committee on Uniform Marriage and Divorce Acts.
31. Report of Committee on Uniform Narcotic Drug Act.
32. Report of Committee on Uniform Settlements Act.
33. Report of Committee on Uniform Foreign Corporation Act.
34. Report of Special Committee on Uniform Cooperative Marketing Act.
35. Report of Committee on Amendments of Uniform Criminal Extradition Act.
36. Report of Committee on Uniform Machine Gun Act.
37. Report of Special Committee on Uniform Criminal Statistics Act.
38. Report of Committee on Uniform Civil Depositions Act.
39. Report of Committee on Uniform Notice of Probate Act.
40. Report of Committee on Uniform Ancillary Administration of Estates Act.
41. Report of Special Committee on Uniform Mechanics' Lien Act.
42. Report of Special Committee on Uniform Act to Establish Wills Before Death of Testator.
43. Report of Special Committee on Uniform Acts Regarding Evidence.
44. Report of Special Committee on Statute of Limitations Act.
45. Report of Special Committee on Cooperation with American Law Institute.

Wednesday, August 23

9:30 A. M.

Consideration of Draft of Uniform Acknowledgments of Instruments Act.

Consideration of Draft of Uniform Civil Depositions Act.

Consideration of Draft of Uniform Aeronautics Act, including Air Licensing Act and Airport Act.

2:00 P. M.

Consideration of Draft of Uniform Estates Act.

Thursday, August 24

9:30 A. M.

Consideration of Draft of Uniform Intestacy Act.

Consideration of Draft of Uniform Trust Administration Act, including Trustees' Accounting Act.

Consideration of Draft of Uniform Foreign Corporation Act.

2:00 P. M.

Consideration of Draft of Uniform Cooperative Marketing Act.

Friday, August 25

9:30 A. M.

Consideration of Draft of Uniform Bank Collection Act.

2:00 P. M.

Consideration of Draft of Uniform Trade-Mark Act.

3:00 P. M.

Special Orders.

4:00 P. M.

Reports of Committees on Memorials.

Saturday, August 26

9:30 A. M.

Consideration of Draft of Uniform Trust Receipts Act.

Monday, August 28

9:30 A. M.

Consideration of Draft of Amendments to Uniform Negotiable Instruments Act.

2:00 P. M.

Unfinished and New Business.

Adjournment.

National Conference of Bar Examiners

Room C, Civic Auditorium

Tuesday, August 29

10:00 A. M.

James C. Collins, Chairman, Presiding.

Summary of Progress made by National Conference of Bar Examiners, by James C. Collins, Chairman.

Address by Charles E. Clark, Dean of Yale Law School and President of Association of American Law Schools.

Other speakers to be announced later.

Several round tables on subjects of interest to bar examiners will be held in the evening, details to be announced later.

National Association of Attorneys-General
Twenty-Seventh Annual Meeting—Grand Rapids, Michigan

Room E, Civic Auditorium

Monday, August 28, 11:00 A. M.

Hon. James M. Ogden, of Indiana, President, presiding.

Address of Welcome: Hon. Patrick H. O'Brien, Attorney General of Michigan.

Responses: Hon. Charles E. Winters, Attorney General of Porto Rico.

Hon. Thomas E. Knight, Jr., Attorney General of Alabama.

Hon. Philip J. Lutz, Jr., Attorney General of Indiana.

Report of Secretary and Treasurer: Hon. Ernest L. Averill, of Connecticut.

President's Address: "Opinions by Attorney General."

Afternoon Session, 2:30 P. M.

Address: "Office Conferences," Hon. Joseph E. Messerschmidt, of Wisconsin.

Address: "Our Changing Laws as to Taxation," Hon. Cary D. Landis, of Florida.

General Discussion of Addresses.

Tuesday, August 29, 11:00 A. M.

Address: "System in the Office of the Attorney General," Hon. William A. Schnader, of Pennsylvania.

Address: "Our Changing Laws as to Banking," Hon. Joseph E. Warner, of Massachusetts.

General Discussion of Addresses.

Appointment of Committee on Resolutions.

Appointment of Committee on Nominations.

Afternoon Session, 2:30 P. M.

Address: "Office Correspondence," Hon. John R. Saunders, of Virginia.

Address: "Some Observations on the Hawes-Cooper Act," Hon. Raymond T. Nagle, of Montana.

Address: "Civil Proceedings in the Attorney General's Office in New England," Hon. Lawrence C. Jones, of Vermont.

General Discussion of Addresses.

Committee Reports.

Election of Officers.

Adjournment.

Conference on Personal Finance Law
Annual Luncheon Meeting

Pantlind Hotel, Tuesday, August 29, 1933, 12:30 P. M.

International Association for the Protection of Industrial Property

(American Group)

Annual Luncheon Meeting

Pantlind Hotel, Wednesday, August 30, 1933, 12:30 P. M.

Committee reports and recommendations.

Election of Officers.

The American Group, formed to enlarge the protection accorded to inventions, marks and designs, and to procure the adoption of laws and agreements relating to such protection, has met annually for the last four years in conjunction with the meeting of the American Bar Association.

Members of the American Bar Association who may be interested are cordially invited to attend the luncheon and meeting, and reservations may be made by request to the Executive Secretary of the American Bar Association, 1140 N. Dearborn Street, Chicago, Ill.

Arrangements for the Fifty-Sixth Annual Meeting

Grand Rapids, Michigan, August 30, 31 and September 1

Section Meetings, Monday and Tuesday, August 28 and 29.

General Sessions, Wednesday, Thursday and Friday, August 30, 31 and September 1.

Annual Dinner Friday evening, September 1.

HEADQUARTERS: Pantlind Hotel.

Hotel accommodations with private bath are available as follows:

	Single (for 1 person)	Dble. (Dble. bed for 2 persons)	Twin Beds (for 2 persons)	Parlor Suites
Pantlind Hotel*	$2.50–$4.00	$4.00–$6.00		
Morton Hotel	2.50– 4.00	4.00– 5.50	$5.00–$7.00	$12.00
Hotel Rowe	2.50– 4.00			

*A few rooms with running water but without bath, double bed, $2.50 for one person, $4.00 for two persons.

As space at the Pantlind Hotel will shortly be exhausted, reservations should be made as early as possible, and it is advisable to indicate second choice of hotel. Requests should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

Travel Arrangements and Reduced Rates for Grand Rapids Meeting

Application for reduced rates for members who will attend the Annual Meeting has been granted by the Central Passenger Association, and those purchasing round trip tickets will be able to secure the same for one fare and one-third.

Members living west of Chicago who wish to attend the Century of Progress Exposition may arrange for stop over privileges, and members living in the East may have tickets routed in either direction by way of Chicago if they wish to stop in that city for the exposition.

Identification certificates will be mailed to all members with the Advance Program, in which there will appear detailed information concerning the dates on which tickets will be sold and instructions for using the certificates.

AMERICAN BAR ASSOCIATION JOVRNAL

BOARD OF EDITORS

EDGAR B. TOLMAN, Editor-in-Chief.....Chicago, Ill.
R. E. LEE SANER, Chairman.....Dallas, Texas
CHESTER I. LONG, Vice-Chairman.....Wichita, Kan.
HERMAN OLIPHANT.....Baltimore, Md.
GURNEY E. NEWLIN.....Los Angeles, Cal.
CHARLES P. MEGAN.....Chicago, Ill.

Subscription price to individuals, not members of the Association nor of its Section of Comparative Law, $3 a year. To those who are members of the Association (and so of the Section), the price is $1.50, and is included in their annual dues. Price per copy, 25 cents.

JOSEPH R. TAYLOR
MANAGING EDITOR
Journal Office: 1140 N. Dearborn Street
Chicago, Illinois

THE LAW AS A PUBLIC PROFESSION

The law is a public profession in two senses. The functions of the lawyer in the discharge of his duties as a part of the machinery of Justice are of course distinctly and officially of a public nature. Beyond this, unofficial but no less distinct, are his functions in the political life of a constitutionally governed country like ours. By the very nature of our government and of the profession which he follows, the lawyer is called on to play an important part in public affairs—a part for which his training peculiarly fits him. Such functions are an integral part of the great traditions of the American Bar.

Recognition of this important aspect of the lawyer's calling is found in an amendment to the Constitution of the American Bar Association proposed by the Executive Committee and printed in this issue. It proposes to add to the familiar objects of the Association as expressed in Article I another provision which will authorize it "to express and advocate its views on such questions of public interest or pertaining to the general welfare as it shall deem proper." Heretofore, as is well known to the members, these objects have been summed up as follows: "To advance the science of jurisprudence, promote the administration of justice and uniformity of legislation and judicial decision throughout the nation, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar."

The proposed enlargement of the declared purposes of the organization seems to bring its objects fully in line with the admitted duties and responsibilities of the public profession of the law. The extent to which, if adopted, it will be reflected in the resolutions and actions of the Association can of course not be predicted. But it may safely be assumed that the sound discretion which has marked the course of the Association to date would be manifested in any steps which it might take in the newer direction indicated. One of the most notable features which has marked the career of the organization to date has been the absence of political, sectional and other divisions in its ranks and the ability of the officers and members to rise above such considerations on all occasions. This furnishes all the guarantee needed that when the Association expresses "its views on questions of public interest or pertaining to the general welfare," the occasion will be fitting, the matter will be important, and the opinion expressed will be that of the legal profession conscious of its public responsibility.

Other important amendments proposed by the Executive Committee contemplate a reorganization of the present Comparative Law Bureau so as to include International Law within the field of that section, and the creation of a new Section of Insurance Law. The first change seems logical, and the second is in response to the expressed desires of a group specially interested in insurance law. Its addition to the list of sections will afford another illustration of the flexibility of the Association's organization and the ease with which the special needs of various groups can be met. Addition of the Committee on Unauthorized Practice of the Law to the list of Standing Committees — a proposed amendment to the By-Laws—comes as a matter of course, in view of the importance of the subject and the constantly growing interest of the members in efforts to curb the intrusion of lay agencies into the field of legal practice.

The amendment to the Constitution proposed by three members, to reduce the dues for the younger members for the first five years after their original admission to the Bar, is another manifestation of the desire of older lawyers to be helpful to those who are just starting their professional career. It should encourage them to make early contact with Association activities and thus aid them in developing a desirable

esprit de corps and a more definite appreciation of the importance of maintaining professional standards.

A REVOLUTIONARY VIEW

During the course of an address recently made to the Law and other graduates of the University of Baltimore Judge Eugene O'Dunne, of the Supreme Bench of Baltimore, denied the truth of the saying that "the Law is a jealous mistress." He maintained that she was not only not jealous but tolerant of occasional flirtations with literature and other attractions, and even of more serious entanglements.

Judge O'Dunne has certainly selected the most favorable time for making this revolutionary declaration. The vacation season, now with us, lends itself peculiarly to the reception of such a liberal view. To make his argument still more convincing, he adduces certain facts which must lend powerful support to it in the minds of many who may be wavering between a fishing or motor trip, or something of the kind, and an exaggerated loyalty to the jealous mistress. We quote from the address:

"I submit, law is the most tolerant, liberal-minded, long-suffering dame known to history. While living with her, by her, and for her, and on her, you can openly frequent the House of Literature and worship at the Temple of Art or woo the muses without being arraigned at the bar for desertion, non-support or other statutory offenses more grave, and without experiencing even diminution of her affections. The lives of Marshall, Holmes, Brandeis, Cardozo and others are living testimonials of the fact.

"As Marylanders, need I cite William Pinkney, leader of the American Bar, who deserted and abandoned law, once for eight years, and again for over five, while on foreign missions in other fields, and to whom she remained as constant as Penelope, though not then put to her twenty-years' test. Luther Martin divided his affections between law and the tavern (without a peer at either place) and to each of them he was equally devoted. He lived with both mistresses at the same time. Even when drunk, he was a match for the best, when sober. William M. Evarts, John H. Choate, and, among the living, Elihu Root, John W. Davis, Newton D. Baker and others, deserted her for years, but, when they returned, she smiled on them with renewed affections in their undiminished glory at the Bar."

He states that "these and illustrious names have demonstrated the promiscuity permitted at the Bar." He then proceeds to cite some of the others, but we need not labor the point further at this time. Defenders of the traditional, unchanging jealousy of the Law will no doubt be found as autumn comes and winter once more brings its chill encouragement to greater constancy. But for the present Judge O'Dunne's radical view is too pleasing to be challenged.

THE SUPREME COURT AND ANCILLARY RECEIVERSHIPS

We do not wish to dwell unduly on the ability of the Courts to manage their affairs more efficiently by their own rules than by means of any outside regulations, but the importance of the subject justifies more than an occasional reference. And where a definite illustration of the principle is afforded, it is well worth calling attention to it, particularly at this stage of the public and professional education on the subject.

Such an illustration is afforded by the order which the United States Supreme Court has just made in reference to ancillary receiverships in District Courts in bankruptcy proceedings pending in any other District of the United States. Appointment of such receivers in many cases has called forth just criticism. Present conditions threatened to make a bad situation a great deal worse. But the Supreme Court by the simple exercise of its rule-making power imposed conditions on the appointment of such receivers which should afford ample protection to all. They are henceforth not to be named except on application of the primary receiver, or on application of any party in interest with the consent of the primary receiver, or by leave of the court of original jurisdiction or a judge thereof. Other provisions of the order strengthen the protection thus afforded.

Progress at present seems slow, but the time will surely come when the logic of giving the United States Supreme Court the same power of official action on the law side that it now has on the equity side will permeate the Congressional mind and result in the adoption of the appropriate and too long delayed measure.

REVIEW OF RECENT SUPREME COURT DECISIONS

Former Decree in Chicago Sanitary District Case Enlarged to Require State of Illinois to Raise and Apply Money for Carrying Out Directed Sewage Disposal Plant Program — Effect of Adjudication in Bankruptcy on Receivership Fees Allowed by State Court out of Bankrupt's Estate — Jurisdiction of Court of Appeals of District of Columbia to Review Orders of Federal Radio Commission—Washington Statute Providing for Substituted Service on Secretary of State under Certain Circumstances Held Not Violative of Due Process—Circumstances under Which Equity Will Withhold Injunction for Nuisance on Condition That Damages Are Paid for Injury

By Edgar Bronson Tolman*

States—Adjudication of Controversies between States—Enforcement of Decree

Under the decree of the Supreme Court previously adjudging that the State of Illinois and the Sanitary District of Chicago are wrongfully diverting an excessive quantity of water from Lake Michigan, to the injury of other States, and directing the Sanitary District to construct sewage disposal facilities as a condition for decreeing gradual rather than immediate reduction in the quantity of water diverted, it appearing that said Sanitary District is now unable to raise, by taxation or by the issue and sale of bonds, money enough to construct such works, it is the duty of the State of Illinois to provide the funds necessary to carry the decree into effect.

The decree directing reduction of the quantity of water diverted and directing the Sanitary District to construct the disposal plant did not exhaust the powers of the Court, and the decree is enlarged to require Illinois to raise and apply moneys for the carrying out of the directed program.

Wisconsin et al. v. Illinois et al., Adv. Op. 279; Sup. Ct. Rep., Vol. 53, p. 671.

The opinion in this case, before the Court under its original jurisdiction, dealt with a phase of the controversy between certain States regarding the diversion by Illinois of the water of Lake Michigan through the Chicago Sanitary District Canal. The Court had previously decided that the quantity of water diverted should be reduced, but had permitted the reduction to be made gradually to allow time for the construction of sewage disposal plants, "in order," as stated by Mr. Justice Holmes, "to avoid so far as might be possible pestilence and ruin with which the defendants have done much to confront themselves."

The complainants applied for the appointment of a commissioner or special officer to execute the decree, urging that the defendants, Illinois, and the Sanitary District of Chicago, are delaying construction of the facilities called for by the decree requiring reduction of the quantity of water diverted. The Court appointed a Special Master to inquire into the matter and to report his findings.

The Special Master found that the cause of delay in procuring the approval by the Secretary of War of construction of controlling works in the Chicago River is a total and inexcusable failure of the defendants to apply for such approval; the causes of delay in providing for construction of the planned treatment works are (1) an inexcusable and planned postponement of the beginning of such works to January 1, 1935, leaving inadequate time for completion thereof before the end of 1938; (2) failure to proceed to a definite decision as to a site and the acquisition thereof; and (3) failure to proceed diligently with the preparation of designs, plans and specifications of the works. The Master recommended that the decree be enlarged so as to require Illinois to provide money and to take the steps necessary to complete the sewage facilities.

In adopting the recommendation to enlarge the decree to require the State to provide funds for the work, the Court, in an opinion by Mr. Chief Justice Hughes, first considered the question raised by the State as to its relation to the suit and its obligations under the decree. This question concerned the nature and extent of the State's liability, the objection being that no legal liability has been determined as against the State, and that none should be assumed. Rejecting this argument, Mr. Chief Justice Hughes said:

> In this controversy between States, the State of Illinois by virtue of its status and authority as a State is the primary and responsible defendant. While the Sanitary District is the immediate instrumentality of the wrong found to have been committed against the complainant States by the diversion of water from Lake Michigan, that instrumentality was created and has continuously been maintained by the State of Illinois. Every act of the Sanitary District in establishing and continuing the diversion has derived its authority and sanction from the action of the State, and is directly chargeable to the State. The adjudication as to the right of the complainant States to have the diversion reduced as provided in the decree is an adjudication not merely as against the Sanitary District but as against the State as the defendant responsible under the Federal Constitution to its sister States for the acts which its creature and agent, the Sanitary District, has committed under the State's direction.

The Court observed further that the stated conclusion would be inevitable, although the drainage canal were established solely for the local benefit of a part of the State, but added that the project in fact contemplates an improvement of navigation for the benefit of the people of the entire State. Attention was called also to the fact that the Court had determined the lia-

*Assisted by James L. Homire.

bility of the State, and that MR. JUSTICE HOLMES had summed up the matter in these words:

> "It already has been decided that the defendants are doing a wrong to the complainants and that they must stop it. They must find out a way at their peril. We have only to consider what is possible if the State of Illinois devotes all its powers to dealing with an exigency to the magnitude of which it seems not yet to have fully awaked. It can base no defences upon difficulties that it has itself created. If its constitution stands in the way of prompt action it must amend it or yield to an authority that is paramount to the State."

The State of Illinois also argued that measures for the protection of the lives and health of its citizens are within its police power, the exercise of which is not obligated by the Federal Constitution. But the Court rejected this contention, saying that the measures required by the decree were not ordinary health measures, but were required as conditions to a postponement of the relief demanded by the complainants.

> "The argument ignores the fact that the question does not concern the ordinary exercise of the police power of the State, but rather concerns the duty of the State to take measures to end the condition which it has urged, and still urges, as a ground for the postponement of the relief to which the complainant States have been found to be entitled. The wrong has been inflicted and is a continuing one. The decision was that this wrong must be stopped. It was not stopped at once merely because of the plight of the residents of Chicago and the adjacent area, in whose interest time was sought to provide works and facilities for sewage disposal. The Court fittingly recognized this exigency. The Court directed a careful inquiry in order to ascertain the time necessary to provide adequate protection. The duty to supply that protection was, and is, the duty of the State. . .
>
> In this aspect of the case, there is no room for the contention that the defendant State, if it were so disposed, by failing to provide protection for its people and by trusting to what it terms "the same compelling humanitarian necessity which orginally induced the Court to postpone the final stoppage of diversion," could, in effect and according to its pleasure, by reason of the inability of the Court to impose specific requirements as to needed measures, delay or prevent the enforcement of the decree. The Court did not exhaust its power by the provisions enjoining the diversion according to the times and amounts prescribed. The Court omitted further specific requirements not because of want of power but in the expectation that the diligence of defendants in carrying out the program they had submitted to the Court would give no occasion for such specifications. In deciding this controversy between States, the authority of the Court to enjoin the continued perpetration of the wrong inflicted upon complainants, necessarily embraces the authority to require measures to be taken to end conditions, within the control of defendant State, which may stand in the way of the execution of the decree.

Accepting the Sanitary District's conclusion that controlling works in the Chicago River will not be needed under the maximum diversion set for December 31, 1935, and the representation of the defendants, that, due to change in plans, the treatment works can be completed by the time required, the Court passed to the question as to financial measures which the State should take. The conclusion was reached that the decree should be enlarged to require the State to provide funds necessary for carrying out the construction program.

> The question, then, comes down to the procuring of the money necessary to effect the prompt completion of the sewage treatment works and the complementary facilities. To provide the needed money is the special responsibility of the State of Illinois. For the present halting of its work the Sanitary District is not responsible. It appears to be virtually at the end of its resources. The Master states that, due to its financial situation, the Sanitary District cannot go forward in any adequate manner with either contracts or construction. We find that the Master's conclusion, that there is no way by which the decree can be performed under tolerable conditions "unless the State of Illinois meets its responsibility and provides the money," is abundantly supported by the record.
>
> That responsibility the State should meet. Despite existing economic difficulties, the State has adequate resources, and we find it impossible to conclude that the State cannot devise appropriate and adequate financial measures to enable it to afford suitable protection to its people to the end that its obligation to its sister States, as adjudged by this Court, shall be properly discharged.

The case was argued by Messrs. Henry N. Benson, Raymond T. Jackson and Gilbert Bettmann, Attorney General of Ohio, for the complainants, and by Messrs. Joseph B. Fleming and William Rothmann for the Sanitary District of Chicago. Mr. Oscar E. Carlstrom, Attorney General of Illinois, submitted the cause for defendant, the State of Illinois.

Bankruptcy—Receivership—Counsel Fees

The jurisdiction of a state court over property in its control by the appointment of a receiver is terminated by exercise of the paramount jurisdiction of a federal court of bankruptcy, and after the adjudication of bankruptcy the state court may not allow fees for the receivers and their counsel payable out of the bankrupt's estate.

Gross and Gross v. Irving Trust Co., Adv. Op. 798; Sup. Ct. Rep. Vol. 53, p. 605; 22 Am. B. R. (N. S.) 661.

On October 13, 1931, the Court of Chancery of New Jersey, appointed receivers for Crosby Stores, Inc., and the receivers took possession of the assets in New Jersey and operated the business. Next day an involuntary petition in bankruptcy was filed in the federal court for the Southern District of New York, and Irving Trust Company was appointed receiver in bankrutcy. Adjudication in bankruptcy followed, and Irving Trust Company was continued as trustee, and later sold all of the assets of the bankrupt, including those in the hands of the New Jersey receivers.

A rule was made absolute by the federal court requiring the receivers to turn over the bankrupt's property to the trustee, but the state court allowed the receivers and their counsel fees aggregating $10,350. Thereafter, the federal court enjoined the receivers from interfering with the trustee and from disposing of the moneys allowed them by the state court. On petition of the trustee, the bankruptcy court declared the allowances void and required the receivers to apply to it for their compensation. On certiorari the Supreme Court, in an opinion by MR. JUSTICE SUTHERLAND sustained the judgment of the Circuit Court of Appeals affirming the District Court.

Pointing out that the federal court has paramount jurisdiction in bankruptcy superseding the state court's jurisdiction, MR. JUSTICE SUTHERLAND said:

> The sole question presented for our determination is: Did the state chancery court have the power to fix the compensation of its receivers and their counsel after bankruptcy had supervened within four months of the filing of the bill of complaint in, and the appointment of receivers by, that court?
>
> The state courts of New Jersey have steadily held in the affirmative, and that view is not without support. We deem it unnecessary, however, to review these decisions. They are not in harmony with the views expressed by this court or with other decisions, which, in our opinion, state the true rule.
>
> Upon adjudication of bankruptcy, title to all the property of the bankrupt, wherever situated, vests in the trustee as of the date of filing the petition in bankruptcy. The bankruptcy court has exclusive jurisdiction, and that

court's possession and control of the estate cannot be affected by proceedings in other courts, state or federal. . . . Such jurisdiction having attached, control of the administration of the estate cannot be surrendered even by the court itself. . . . "The filing of the petition is a caveat to all the world and in fact an attachment and an injunction."

The Court called attention to the distinction between the rule regarding courts having concurrent jurisdiction, in which case the one first acquiring jurisdiction retains it, and the rule applicable in a case where, as here, one court has paramount jurisdiction. But even in the latter case, it was added that due regard for comity would ordinarily require an application to the Court exercising jurisdiction to relinquish the same to the tribunal with paramount authority.

The exclusive power of the bankruptcy court to fix the receivers' fees was emphasized in conclusion.

> The jurisdiction of the bankruptcy court being paramount, the power of the state court to fix the compensation of its receivers and the fees of their counsel necessarily came to an end with the supervening bankruptcy. When the bankruptcy court acquired jurisdiction, the sole power to fix such compensation and fees passed to that court. . . . We adopt, as stating the correct rule, the language used in *Lion Bonding Co.* v. *Karatz*, 262 U. S. 640, 642, although it was not strictly necessary to that decision: "Even where the court which appoints a receiver had jurisdiction at the time, but loses it, as upon supervening bankruptcy, the first court cannot thereafter make an allowance for his expenses and compensation. He must apply to the bankruptcy court."

The case was argued by Mr. Merritt Lane for the petitioners, and by Mr. Samuel Kaufman for the respondent.

Federal Radio Commission—Statutory Powers—Judicial Review of Commission's Order

The jurisdiction of the Court of Appeals of the District of Columbia to review an order of the Federal Radio Commission is limited to legal questions and does not extend to the determination of administrative questions. Consequently, the decisions of that Court in such cases constitute an exercise of judicial, rather than administrative or legislative, power and are subject to review by the Supreme Court on certiorari.

Under the Radio Act, the Commission may order the deletion of a station of a particular class in an under quota state in favor of a station of such class in another state, which is over quota as to such class, although both states are in the same zone, to enable the latter station to operate on a frequency or wave length theretofore assigned to the former station, provided the Commission does not act arbitrarily or capriciously.

Federal Radio Comm. vs. Nelson Bros. Bond & Mortgage Co., Adv. Op. 808; Sup. Ct. Rep., Vol 53, p. 627.

This opinion, by MR. CHIEF JUSTICE HUGHES, dealt with a review, on certiorari, of a judgment of the Court of Appeals of the District of Columbia which by a divided bench had reversed a decision of the Federal Radio Commission as arbitrary and capricious. The Supreme Court sustained the order of the Radio Commission.

The proceeding was commenced on application of the Johnson-Kennedy Radio Corporation, owner of Station WJKS at Gary, Indiana, to the Commission for modification of a license so as to permit operation, with unlimited time on the frequency of 560 kc, then assigned to Stations WIBO and WPCC, at Chicago, Illinois. The Commission granted the application, thus permitting Station WJKS to operate on the frequency of 560 kc, and terminating the existing license to the other two stations.

The first question considered by the Court was whether the function of the Court of Appeals was a judicial function under the statute, so as to be within the jurisdiction of the Supreme Court to review, or was an administrative function, not subject to review on certiorari. In this connection the CHIEF JUSTICE called attention to the fact that the jurisdiction of the Court of Appeals as to such decisions has been modified by legislation so as to confer on that Court judicial as distinguished from an administrative power.

As to this, the opinion states:

> In the light of the decision in the *General Electric* case (281 U. S. 464), the Congress, by the Act of July 1, 1930, c. 788, amended section 16 of the Radio Act of 1927 so as to limit the review by the Court of Appeals. 46 Stat. 844; 47 U. S. C. 96. That review is now expressly limited to "questions of law" and it is provided "that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious." This limitation is in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review. Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the Commission as its instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the Court is to pass. The provision that the Commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the Court an authority to revise the action of the Commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. . . .
>
> If the questions of law thus presented were brought before the Court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the Court is a judicial function, and, if so, it may be exercised on an authorized appeal from the decision of an administrative body. We must not "be misled by a name, but look to the substance and intent of the proceedings."

Passing to the merits, the Court considered two principal questions (1) whether the Commission, in making allocations of frequencies or wave lengths to states within a zone, has power to license operation by a station in an "under-quota" state on a frequency theretofore assigned to a station in an "over-quota" state, and to terminate the license of the latter station; and (2) whether, if the Commission has this power, its findings of fact sustained the order under review, in

the light of the statute, and if so whether the findings were supported by substantial evidence.

> No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communications. No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities. In view of the limited number of available broadcasting frequencies, the Congress has authorized allocation and licenses. The Commission has been set up as the licensing authority and invested with broad powers of distribution in order to secure a reasonable equality of opportunity in radio transmission and reception.

The Radio Act divides the United States into five zones, and Illinois and Indiana are both in the Fourth Zone. The Commission is directed to assign bands of frequency or wave lengths to stations as public convenience, interest or necessity requires, to determine the power each station shall use, the time during which it may operate, and the location of classes of stations or individual stations. Section 9 declares that the people of all zones are entitled to equality of broadcasting service, both transmission and reception, and under it the Commission is to make a fair and equitable allocation of licenses, wave lengths, time and station power to each state within each zone, according to population. The Commission may grant or refuse licenses or their renewals, and may increase or decrease station power, in order to effectuate equality of broadcasting service.

By General Order No. 40 the Commission established a basis for equitable distribution of facilities, setting up three classes of stations which have come to be known as "clear, regional, and local channel stations." To determine the total value of the three classes in a state the Commission developed a "unit system," to evaluate stations, based on type of channel, power and hours of operation, and all other considerations required by law. By General Order No. 92 the Commission specified the "unit value" of stations of various types, and was then able to tabulate zones and states showing "units due," based on estimated population and the "units assigned." In respect of total facilities, Indiana is "under quota" and Illinois is "over quota" in station assignments.

The respondents contended that the order in question violated the principles set forth in General Order No. 92 because it ignored the fact that, both States being under quota in regional station assignments, Indiana has more of such assignments in proportion to its quota than has Illinois, and that by deleting the regional stations in Illinois in favor of an Indiana station the Commission violated the statute. But the Court found no such violation, and said:

> We find in the Act no command with the import upon which respondents insist. The command is that there shall be a "fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the States within each zone." It cannot be said that this demanded equality between States with respect to every type of station. Nor does it appear that the Commission ignored any of the facts shown by the evidence. The fact that there was a disparity in regional station assignments, and that Indiana had more of this type than Illinois, could not be regarded as controlling. In making its "fair and equitable allocations," the Commision was entitled and required to consider all the broadcasting facilities assigned to the respective States, and all the advantages thereby enjoyed, and to determine whether, in view of all the circumstances of distribution, a more equitable adjustment would be effected by the granting of the application of Station WJKS and the deletion of Stations WIBO and WPCC.

The respondents also urged that the provision enabling the Commission to grant or refuse licenses or renewals thereof applies to apportionments between zones, but not between States. This distinction the Court rejected, observing that:

> The Congress was not seeking in either case "an exact mathematical division." It was recognized that this might be physically impossible. The equality sought was not a mere matter of geographical delimitation. The concern of the Congress was with the interests of the people—that they might have a reasonable equality of opportunity in radio transmission and reception, and this involved an equitable distribution not only as between zones but as between States as well. And to construe the authority conferred, in relation to the deletion of stations, as being applicable only to an apportionment between zones and not between States, would defeat the manifest purpose of the Act.
>
> We conclude that the Commission, in making allocations of frequencies to States within a zone, has the power to license operation by a station in an under-quota State on a frequency theretofore assigned to a station in an over-quota State, provided the Commission does not act arbitrarily or capriciously.

The evidence in support of the Commission's findings was summarized and the conclusion reached that it furnished substantial support for the decision of the Commission.

The case was argued by Mrs. Mabel Walker Willebrandt for the petitioners and by Mr. James M. Beck for the respondents.

Constitutional Law—Due Process—Validity of Substituted Service

A state statute requiring a foreign corporation to designate a resident agent on whom process may be served, and prescribing that service may be made on the corporation by service on the Secretary of State, upon revocation of the agent's authority, does not offend against the requirements of due process of law, even though the Secretary of State is not required to notify the defendant of such service. The corporation may protect itself by appointing another agent, or by making other arrangements for notice.

State of Washington, ex rel Bond & Goodwin & Tucker, Inc. v. Superior Court, Adv. Op. 786; Sup. Ct. Rep. Vol. 53, p. 624.

The Court in this case considered the validity of substituted service of process on the appellant corporation, by service on an Assistant Secretary of State of Washington, after the corporation had withdrawn from that State. The appellant appeared specially and moved to quash the service. The appeal is from the State Supreme Court denying a writ of prohibition to the trial court, after the latter had overruled the motion to quash.

Appellant is a Delaware corporation which qualified to do business in the State of Washington in 1926, when it appointed one Shaw its resident agent at Seattle to accept service of process, as the statute required. In 1929 it withdrew from the State, ceased doing business there and filed formal notice of withdrawal with the Secretary of State. The corporation was dissolved, but Shaw's appointment was never revoked. In 1929 he removed to California. In 1932 the action in question was commenced by service of summons and complaint on an Assistant Secretary of State, but no copy or notice thereof was sent to the appellant, and no other form of service was made. The statute provides that in case of the revocation of the agent's authority after the corporation withdraws from the state, service may be made upon the Secretary of State,

and shall be held as due and sufficient service on the corporation.

The appellant contended that the statute denies to it due process of law because it does not require the Secretary of State to notify it of the service. Rejecting this contention the Court, in an opinion by MR. JUSTICE ROBERTS said:

> The State need not have admitted the corporation to do business within its borders. . . . Admission might be conditioned upon the requirement of substituted service upon a person to be designated either by the corporation, . . . or by the State itself . . . or might, as here, be upon the terms that if the corporation had failed to appoint or maintain an agent service should be made upon a state officer . . . The provision that the liability thus to be served should continue after withdrawal from the State afforded a lawful and constitutional protection of persons who had there transacted business with the appellant. . . .
>
> It has repeatedly been said that qualification of a foreign corporation in accordance with the statutes permitting its entry into the State constitutes an assent on its part to all the reasonable conditions imposed. . . . It is true that the corporation's entry may not be conditioned upon surrender of constitutional rights, as was attempted in the cases on which the appellant relies. . . . And for this reason a State may not exact arbitrary and unreasonable terms respecting suits against foreign corporations as the price of admission. . . . But the statute here challenged has no such operation. It goes no further than to require that the corporation may be made to answer just claims asserted against it according to law. By appointing a new agent when Shaw ceased to be a resident of the State the appellant could have assured itself of notice of any action. The statute informed the company that if it elected not to appoint a successor to Shaw the Secretary of State would by law become its agent for the purpose of service. The burden lay upon the appellant to make such arrangement for notice as was thought desirable. There is no denial of due process in the omission to require the corporation's agent to give it such notice.

The Court also rejected the further contention that the statute operates as a denial of equal protection of the law, in that it requires the Secretary of State to send a notice to domestic corporations and foreign insurance corporations, in cases of substituted service.

> The contention is without merit. The legislature was entitled to classify corporations in this respect, and a mere difference in the method of prescribing how substituted service should be accomplished works no unjust or unequal treatment of the appellant.

The case was argued by Mr. Frank E. Holman for the appellant, and by Mr. Parker W. Kimbal for the appellee.

Mandamus—Principles Applicable to Granting Writ

Although mandamus is a legal remedy, its allowance is controlled by equitable principles, and it may be refused for reasons comparable to those which would induce a court of equity to refuse protection to legal rights inimical to the public interest.

United States ex rel Greathouse v. Dern, et al., Adv. Op. 790; Sup. Ct. Rep. Vol. 53, p. 614.

This case brought before the Court, on certiorari, the question whether a mandamus should issue to compel the Secretary of War and the Chief of Engineers to permit the petitioners to construct a wharf for the storage of gasoline in the Potomac River. The petitioners own lands in Virginia and proposed to build a wharf adjacent thereto on lands in the District of Columbia, below the high water mark of the Potomac River. It was stipulated that the wharf will not interfere with navigation.

The Government conceded that the only basis for refusal of the permit is that the wharf would be inimical to the establishment of the George Washington Memorial Parkway, which has been authorized by Congress. Pending the suit, but before its trial, the National Capital Park & Planning Commission, by resolution, declared that it needed for protection of the Parkway, and that it took complete and exclusive possession of all lands lying between the high water line and the center of the channel. This area included the site of the proposed wharf. The Court, affirming the denial of the writ by the District of Columbia Court of Appeals, in an opinion by MR. JUSTICE STONE, pointed out that the petitioners were entitled to relief only if several doubtful questions should be determined in their favor. It was thought unnecessary to determine those questions, however, in view of the fact that the granting of a writ of mandamus would be inimical to the public interest in the development of the Parkway. In this regard, MR. JUSTICE STONE said:

> Although the remedy by mandamus is at law, its allowance is controlled by equitable principles . . . and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right. For such reasons we think the relief sought by mandamus should be denied here, even if petitioners' title to the upland adjacent to the river and their right to build the wharf were less doubtful than they are. The government, through its duly authorized agency, the Park Commission, has declared that both the bed of the river and the upland adjacent to it shall be devoted to a public purpose for the construction of the Parkway, and the plans of the Commission contemplate the taking, by purchase or condemnation, of a part of petitioners' property as a means of access to it. The apparent consequence of authorizing the construction of the wharf would be only to increase the expense to the government of constructing the Parkway, by the cost of destroying the wharf, and by so much of the cost of the wharf and of the other proposed improvements as may be included in the just compensation to be awarded for their taking. Thus the extraordinary remedy by mandamus, invoked to protect rights to which petitioners are not shown to be clearly entitled, would be burdensome to the government without any substantially equivalent benefit or advantage to the petitioners or their vendee, apart from the incidental and irrevelant consequence that petitioners might secure the performance of their conditional contract.
>
> The Court, in its discretion, may refuse mandamus to compel the doing of an idle act . . . or to give a remedy which would work a public injury or embarrassment . . . just as in its sound discretion, a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.

The case was argued by Mr. Spencer Gordon for the petitioners, and by Mr. Seth W. Richardson for the respondents.

Injunction—Nuisance—Continuing Injury

When the expense and hardship which would result from the granting of an injunction are grossly disproportionate to the injury sought to be enjoined, the court, in its discretion, may deny the injunction on condition that the defendant pay damages.

City of Harrisonville v. Dickey Clay Mfg. Co., Adv. Op. 801; Sup. Ct. Rep. Vol. 53, p. 602.

In this case the Court considered the jurisdiction of equity to enjoin a nuisance, and the circumstances under which an injunction should be withheld on condition that damages are paid for the injury resultant upon the nuisance.

The petitioner, City of Harrisonville, Missouri, erected a sewage disposal plant which removed only sixty per cent of the putrescible organic matter. The effluent from the plant was discharged into a meandering stream which flows through a detached portion of

the respondent's farm, devoted to pasturage. It appeared that an additional or secondary disposal plant could be provided which would remove thirty per cent more of the putrescible matter, but this would cost from $25,000 to $30,000. The existing plant was installed in 1923 at a cost of about $60,000.

The District Court found that the aggregate loss in rental value of the land was $500 for the five years from 1923 to 1928, that it would cost $3500 to restore the creek to the condition existing prior to the nuisance, and that an injunction should be granted. It accordingly decreed payment of $4,000 damages and that the nuisance be abated within six months. The Circuit Court of Appeals eliminated the element of damages of $3,500 and affirmed the decree, thus modified. On certiorari the Supreme Court reversed the decree, in an opinion by MR. JUSTICE BRANDEIS, and directed that the depreciation in value be determined and that an injunction be withheld if the amount of depreciation be paid within a time to be fixed by the District Court.

In reaching this conclusion the Court pointed out that an injunction does not issue as of course, but will be withheld where substantial relief can be afforded by payment of damages and the issuance of an injunction would subject the defendant to grossly disproportionate hardship.

> The discharge of the effluent into the creek is a tort; and the nuisance, being continuous or recurrent, is an injury for which an injunction may be granted. Thus, the question here is not one of equitable jurisdiction. The question is whether, upon the facts found, an injunction is the appropriate remedy. For an injunction is not a remedy which issues as of course. Where substantial redress can be afforded by the payment of money and issuance of an injunction would subject the defendant to grossly disproportionate hardship, equitable relief may be denied although the nuisance is indisputable. This is true even if the conflict is between interests which are primarily private . . . Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling . . . Such we think is the situation in the case at bar.
>
> If an injunction is granted the courses open to the City are (a) to abandon the present sewage disposal plant, erected at a cost of $60,000, and leave the residents to the primitive methods theretofore employed, if the State authorities should permit; or (b) to erect an auxiliary plant at a cost of $25,000 or more, if it should be legally and practically possible to raise that sum. That expenditure would be for a desirable purpose; but the City feels unable to make it. On the other hand, the injury to the Company is wholly financial. The pasture land affected by the effluent would be worth, it was said, $50 or $60 an acre if the stream were freed from polution. Denial of the injunction would subject the Company to a loss in value of the land amounting, on the basis of the trial court's findings, to approximately $100 per year. That loss can be measured by the reduction in rental or the depreciation in the market value of the farm, assuming the nuisance continues; and can be made good by the payment of money. The compensation payable would obviously be small as compared with the cost of installing an auxiliary plant, for the annual interest on its cost would be many times the annual loss resulting to the Company from the nuisance. Complete monetary redress may be given in this suit by making denial of an injunction conditional upon prompt payment as compensation of an amount equal to the depreciation in value of the farm on account of the nuisance complained of. We require this payment not on the ground that the nuisance is to be deemed a permanent one as contended; but because to oblige the Company to bring, from time to time, actions at law for its loss in rental would be so onerous as to deny to it adequate relief.

The case was argued by Mr. Raymond G. Barnett for the petitioner, and by Mr. Leland Hazard for the respondent.

Bankruptcy—Trustee's Right to Recover Value of Property Transferred in Fraud of Creditors

A trustee in bankruptcy is not estopped from challenging the validity of a pledge made by the bankrupt in fraud of creditors, even though the sole creditor of the bankrupt accepted the pledge with knowledge of an existing prior lien, where the creditor did not know that such prior lien was given with the intent to defraud creditors.

The pledgee who takes with knowledge of the fraudulent intent is liable for the value of the property pledged, which he transferred to another, even though he reacquires the same during the pendency of the suit, or, after reacquiring it, he may be required to surrender the property, at the election of the defrauded creditor.

Buffum v. Peter Barceloux Co., Adv. Op. 679; Sup. Ct. Rep., Vol. 53, p. 539; Am. B. R. (N. S.) 596.

This opinion, by MR. JUSTICE CARDOZO, dealt with a suit brought by a trustee in bankruptcy to recover the value of property of the bankrupt which had been pledged with fraudulent intent. The facts are stated fully in the opinion, and disclose that the bankrupt, Henry Barceloux, in April, 1926, owned 2,500 shares of stock in the Peter Barceloux Company. His shares had a book value of $90,000 and an actual value of $94,000. This was a quarter of the capital stock; the rest was owned by close relatives. A former partner, Freeman, had recovered judgment against him for nearly $50,000. In addition there were other creditors. But on April 27, 1926, Henry Barceloux pledged all of his stock, except one share, to secure part of an indebtedness to the corporation, amounting to about $33,000. On Freeman's death his administrator pressed the creditor for security and in June, 1926, an assignment was given to him of the equity in the Barceloux shares, together with an assignment of an interest in heavily mortgaged lands. Henry Barceloux made further pledges of shares in other companies to secure the family debt. At the same time the corporation cancelled the certificate pledged to it and issued another in its own name as pledgee.

> On August 16, 1926, there was the gesture of a public sale. A printed notice had been posted on a telegraph pole and perhaps elsewhere. There was no other notice either to Freeman or to any one else. At the appointed time the members of the family, accompanied by a lawyer, went through the form of an auction on the steps of the court house. The debtor's sister Cora, who was a director of the corporation, read the notice of sale and asked for bids; all the collateral, both the Barceloux shares and the others, being offered as a single lot. The brother George, who was then the president, made a bid for the entire lot in the name of the Barceloux corporation, the bid being for the amount of its claim against the debtor and a fee for its attorney. No sooner had the corporation bought than it sold back again to George. In payment for what it sold, it took his promissory note with a pledge of the shares as collateral security. About two years later, it cancelled the resale, gave back the promissory note and thereafter held the shares as owner.

By October, 1926, Henry Barceloux had stripped himself of all assets, and after four months, became a voluntary bankrupt.

In a suit by the trustee to recover from the corporation the value of the stock, the District Court found the fraudulent intent proved and that pledgor and pledgee had shared in it. It ordered an account to be stated before a master, and on his report a judgment was entered for $106,409.44, interest and costs, in favor of the trustee. The Circuit Court of Appeals, one judge dissenting, reversed the decree, on the ground that the administrator was estopped from con-

testing the validity of the pledge, because he had accepted a pledge of the shares subject to that already existing. It found no sufficient evidence that other creditors were aggrieved, and did not determine whether the pledge was good or bad as to the other creditors. It found the sale unfair, however, and ordered a resale.

On certiorari, the judgment was reversed by the Supreme Court. The question first discussed was the proof sustaining the finding that the pledge to the corporation was in fraud of creditors.

> More is here than a mere preference. If that and nothing else had been intended, the pledge would be proof against attack, for it was made more than four months before the bankruptcy petition. But in truth there was much besides. The pledge was a step in a general plan which must be viewed as a whole with all its composite implications. . . The principal assets of the debtor were his certificates of stock in the family corporation. There was to be a delivery of these certificates as security for an indebtedness much less than the value of the collateral deposited. There was to be a delivery of other security to make sure that all the assets of the debtor, not otherwise incumbered, would be within the control of the pledgee. There was to be a sale so secret that none of the creditors would be likely to know anything about it, with the result that other bids would be forestalled, and embarrassing inquiries as to preferences averted. Finally, to make the job a thorough one, the odds and ends of other assets were to be conveyed to friends or relatives. As the outcome of these maneuvres the Barceloux Company cancelled an indebtedness of about $33,000, and became the owner of stock certificates worth triple that amount. The unconscionable sale is not to be viewed in isolation, as something disconnected from the pledge, an accident or after-thought. It was the fruit for which the seed was planted, or so the trier of the facts might look at it. The Barceloux Company set out to do something more than secure the payment of a debt. It became a party to a plan to appropriate a surplus and in combination with its debtor to hold his creditors at bay. . . So the District Judge interpreted the transaction, viewing the events consecutively as stages of an unfolding plot. We discover no sufficient reason for rejecting his conclusion. Indeed the Circuit Court of Appeals held nothing to the contrary. It refrained from approving or condemning the purpose of the pledge, being led to that course by the application of the doctrine of estoppel. The finding therefore stands.

The Court then discussed the contention that the acceptance of the junior lien estopped the administrator from setting aside the earlier pledge, and that the trustee has no greater rights. As to this it was said in answer that the trustee acted for the benefit of all creditors, and could not be estopped by the act of an administrator.

But in addition, the Court stated that the result would not be different if the administrator stood alone. In this connection it was noted that the administrator had rejected the security and claimed as a general creditor, and that, moreover, he was not informed as to the fraudulent circumstances of the pledge to the corporation.

> The pledge to the administrator is disregarded, and he is left in the same position with reference to any general creditors as if the transaction putting him ahead of them had been undone from the beginning. One who takes a mortgage or an assignment of an interest in property subject to a specific lien may be estopped while he retains the benefit from disavowing the attendant burden. . . He either takes the security upon the terms conditioning the offer, or does not take it at all. The basis for an estoppel is cut away if the transaction is lawfully disaffirmed and the security abandoned. . .
>
> Disaffirmance and abandonment in this instance rested on sufficient grounds. The Freeman administrator, though informed of the fact that there was a pledge superior to his, had no knowledge of anything else. He was not informed of the circumstances essential to an understanding of the fraud. He did not even know, so far as the evidence discloses, whether the pledge was new or old. Only through later events was the collusive plan exhibited in all its sinister significance. There can be no irrevocable estoppel when the truth has been withheld.

The third question discussed was whether the trustee was entitled to recover the value of the shares, or, since the grantee had repurchased them during the pendency of the suit, merely to the shares themselves. Holding that recovery of the value was proper under the circumstances, as against a trustee *ex maleficio*, MR. JUSTICE CARDOZO said:

> The trustee who misapplies the subject matter of a trust becomes accountable at once for the proceeds or the value. . . Nothing that he can do afterwards in buying the property back will affect that liability, except at the option of the beneficiary complaining of the wrong. "This right or option of the *cestui que trust* is one which positively and exclusively belongs to him, and it is not in the power of the trustee to deprive him of it by any repurchase of the trust property, although in the latter case the *cestui que trust* may, if he pleases, avail himself of his own right, and take back and hold the property upon the original trust; but he is not compellable so to do." . . Any other rule, it was said, would enable the wrongdoer to take advantage of his own wrong; to let the transaction stand, if the investment showed a profit, and by aid of a repurchase to charge the beneficiary with an intermediate decline. . . The standard of duty is no different whether the trust to be enforced is actual or constructive. . . The implication of a trust is the implication of every duty proper to a trust. Equity has its distinctive standards of fidelity and honor, higher at times than the standards of the market place. . . Whoever is a fiduciary or in conscience chargeable as a fiduciary is expected to live up to them.

The case was argued by Messrs. Horace B. Wulff and George R. Freeman for the petitioner, and by Mr. Arthur C. Huston for the respondent.

New Law Review Established

THE University of Chicago Law Review has been established by the Law School of that institution, and will be issued as a quarterly. The first number was published in May. It contains leading articles on "The Federal Tort Claims Bill" by Edwin M. Borchard, "The Status of the Child and the Conflict of Laws" by Joseph H. Beale, and "The Trustee's Duty with Regard to Conversion of Investments" by George Gleason Bogert.

An editorial statement by Dean Harry A. Bigelow of the Law School gives details of the new publication.

"The issue of this, the first number of the University of Chicago Law Review," he says, "marks another step in the growth of the school. The Review will have a double purpose harmonious with the character and aims of the school itself. The Law School has in general two points of view: that of a school of national scope with interests as broad as the whole field of the law, and that of a school situated in the city of Chicago and consequently having a very direct and vital interest in the legal problems of the city and state in which it is. Both these points of view and these interests will be manifest in the various departments of the Review." The main divisions "of the magazine will constitute a carefully considered adaptation of the arrangements generally prevailing in law reviews." Special prominence, however, is given to the department of Legislation and Administration, in "recognition of the growing importance of these divisions of our legal systems. This department will treat in these fields both general problems and specific measures, actual and proposed."

A LAWYER LOOKS AT A LAWYER'S TRAINING

Certain Intellectual Attitudes Commonly Expressed in the Law Schools Which Are Destructive of the Free Manifestation of That Intelligence Which Is Our Heritage —Need and Difficulty of Objective Thinking—Tendency to Invest the Law with an Appearance of Vast Profundity—Proper Attitude toward the World of Legal Learning—"The Great Thing Is to Be Simple"

By Leslie Craven

*Professor of Law in Duke University Law School**

ONE purpose of a university is to afford a reflection of a universal viewpoint, through minds of diverse viewpoints. My viewpoint is that of a lawyer, not a teacher. I speak to you as one who, having been a student at such a law school as this, has practiced law for twenty years. Let it be plain that I do not indict the law schools, nor the law teachers. But every one of you will agree that all of us have a common enemy. It is that which impairs the high quality of our thinking. I intend to discuss certain intellectual attitudes commonly expressed in the law schools which I think destructive of the free manifestation of that intelligence which is our heritage. A wise man has said, "So live that the man you wish to be at forty, may be." Each of you is now the potter and your hand should not shake. Goethe said, "Let the young man take care what he asks in his youth, for in his age he shall have it."

The best thing about the lawyer's life is that, if you are big enough, it is a life of endless intellectual growth. That growth of your mind *is* your life, for your life is not made by externals. Emerson said, "Nothing is, at last, sacred but the integrity of your own mind." He might well have said, "Nothing is, at last, important but the infinite unfoldment of your own mind." The two are really the same—for the integrity of your mind is attained by a slow growth and its genesis is that infinite capacity for, and the taking of, infinite pains, to the end that its natural enrichment may appear. This has been seen as the source of genius.

The natural mind of man is a spontaneous bubbling up of native intelligence. Children have this until they become self-conscious. You can perhaps remember that you had it in your youth and, if I am not mistaken, you will observe that as you proceeded through your schooling it faded as you became more self conscious, more impressed by the thinking of others and more burdened with hard work in thinking. The psychologists, who have been studying the training of children, have learned that one thing which greatly inhibits the free play of their natural intelligence is consciousness of self. The whole development of the training of children in modern progressive schools has proceeded upon the basis of a careful recognition of this fact. As I observe the thought processes current in law schools, in the light of my experience as a law student and lawyer, I am impressed with the extent to which the student's thought is robbed of its natural versatility and spontaneity. My thesis here tonight is that this is because there is a failure to avail ourselves of the high privilege and power of objective and impersonal thinking.

What is impersonal thinking? You and I watch an elephant walk up the street. Well, he just comes up the street! We critically observe him. He comes without our effort or responsibility. We need not think about ourselves. We like to look at him but we do not want to own him. Our thought about him is purely objective and impersonal.

Yet, our thought may not be purely impersonal. When fear or desire comes in, we may say, "Will he walk on me?" or "May I own him?" Or "Oh! There is the professor of elephantology. I must find out what he thinks of the elephant, and there is Professor So-and-so over there. He is a practical elephantician. He traveled with a circus and carried water to the elephants for fifteen years. What does he think of the elephant and, oh dear, what will he think of what I think of the elephant!" Such thinking is not impersonal.

My first illustration—impersonal thinking—is the thinking of the seasoned lawyer, the thinking you students will come to have, the thinking you should have now. The second illustration is the thinking I had as a law student. The first is real thinking about the elephant. The second is not, because if I think about what you think regarding what I think about the elephant, I am thereby really thinking about myself, not about the elephant at all. And this is the birthplace of intellectual egotism and untold limitation. Fear and self-consciousness, if you have them, prevent your calm consideration of the law, because they incline you to think of yourselves. Deference to the personality of others is similarly obstructive. Your thought is thus diverted from its right object. This is why you find learning the law difficult. You are not thinking of the law.

After years of effort in trying to think objectively, I can see how my law school training almost defeated it. I can see that the same obstructions beset you. I was brought into a thought field which was entirely new. I stood before it with the awe of the uninitiated for a vast something of which I was ignorant. It involved strange impressions, new concepts, was couched in a strange language. My problem was to make that thinking my own and

*Mr. Craven was for many years Valuation Counsel for the Western Railroads. The address here printed was delivered before the Duke University Bar Association on March 9, 1933.

this I valiantly attempted at the rate of reading, say, fifty pages of hard cases a day.

My way as a student, as yours, was made harder by certain bad habits and traditions of the lawyer and law teacher. Modern scholarship generally is now denying that many branches of thinking are sciences, which for generations have been paraded about as such. The law is in no respect a real science. The law is merely a body of thought which reflects certain phases of man's thinking about human relationships. It does not lie in planes of precision, and is not, nor can it be, entirely logical. Nor need it be highly complicated. I have had long experience in a highly technical field involving a congeries of legal, economic, accounting and engineering principles. Some of the cases appeared to be very complicated. But every one of them ultimately resolved around a few essentially simple principles. Common sense, not occult theory, was their key. This is, I think, true of the greater part of the body of our law. Pascal said, "The great thing is to be simple. But it is so hard to be simple." Certainly it is not the way of wisdom to try deliberately to make things complicated.

But we lawyers, and especially we law teachers, have been guilty, largely unconsciously, of a sort of affectation. Ours has been a learned profession and our egotism has inclined us to strut. We cannot resist the temptation to invest the law with an appearance of vast profundity. This is a natural inclination—in part, the result of a sort of self-hypnosis, because frail humanity finds one measure of its worth in its work, and is prone to magnify its difficulty and importance. Each thinks he sees high qualities in his chosen field which none other sees. The automobile salesman honestly thinks his automobile the best. Further, most people are guilty of the assumption that a man is learned or should be thought to be so if he expresses simplicities in profound language. The practice has been common to the medicine men of the tribes of all the ages. Thus, we may in part account for the pompous language of court decisions, the unnecessary repetition in the language of pleadings and contracts, the hypercritical and supertheoretical structure of many of the law review articles, and their attempts to find intricate and involved legal explanations of which the courts themselves would be neither capable nor guilty.

There is even an unnecessary ostentation in our display of industry. We are told solemnly that we should not submit an article to a law review with notes less than three inches deep. These articles and decisions are the admiration of all aspirants to law review editorial boards, which cite forty decisions in support of propositions not even in dispute, when a single leading case would do. Law work is done in a laborious way consistent with its claimed importance and profundity. The lawyer, like Atlas, is never pictured as upholding his universe with spontaneity. He has the frown of deep responsibility which to the close observer looks like seriousness.

To this law school world, partly real and partly affectation, I came as a student. I came with such spontaneity, individuality, and freedom as were left to my mind after experiencing the regimentation of my under-graduate experience. You will observe that the elements which I have named all tend to make the student think the work difficult and his capacities inadequate. The effect upon me of all this combination of circumstances was to give me an inferiority complex and a personal sense of great responsibility.

The manner of our instruction perpetuates these errors. The law student sets forth valiantly to acquire what appear to be things external to him, and to make them part of himself. He is going to own the elephant. He is certain to get the impression that this acquiring (i.e. learning) and keeping (i.e. remembering) is the essential nature of the educative process. Now, if the essential function of the lawyer were to go about retailing his information like an itinerant Oriental story teller, this method would perhaps be well adapted to the end. But the lawyer is a creator, not a mere retailer. His education should be by a process of unfoldment of his natural powers rather than by an accretion of external facts. The free play of the spontaneous intelligence, the resourceful, colorful, activity of the reasoning powers of the first class lawyer, are quite unlike the activity of a mere mental storekeeper, with his facts all nicely arranged in well ordered boxes, whose contents he dispenses to his clients. These legal mental storekeepers make fairly good law clerks, not lawyers. The factual information, the rules of law, can always be readily found; it is their resourceful use under wise generalship which is difficult. If you think of your mind as a limited sort of storehouse, into which you pile all the things you can grasp, you have an entirely false idea of what education is. It is absolutely unnecessary to make this learning a part of yourself. You make a mistake to try to learn it by that process. The great body of the law is all there. Any part of it is easily available to you. The greatest step in learning it is made when you really know that. It is absolutely useless to try to make anything permanently part of yourself that you do not love, and it is hard to love anything which you can acquire only with a struggle. Fear and the very struggle push it away. How do you account for the remarkable statement which you sometimes hear students make—that as soon as they have passed the examination, they intend to burn their case books and their note books? That attitude of revulsion is the proof that the process is wrong. By what possibility can the student reason objectively when, as at some of our leading law schools, he has been invited, at the beginning of the course, to look at the two students beside him and remember that one will certainly flunk?

Is it not simple enough to see why the academic process makes us self conscious? It is not on an impersonal basis. If you think of your mind as a sort of storehouse into which you are piling your acquisitions in a selfish process to avoid academic extinction, you become selfish. You engage egotistically in a contemplation of your storehouse and a comparison of it with that of others, and, mark my words, your storehouse will always seem paltry to you; you will always be hampered with a fear about it, and your natural and real powers will be hindered in their ripening. There is nothing finer than to work hard, if for the love of it. But if, in the love of self, you stuff your paltry cupboard so that, like a cheap minded housewife, you may display your Mid-Victorian furniture to the envy of your neighbors, your mental life will be that of the drudge. This is the explanation of that common

phenomenon among our American lawyers—the drudge mind and the intellectual egotist. When the housewife displays her egotism and pride in her furniture, we see her at once as a Mrs. Babbitt. But in the academic world we are not so certain to see scholarly ostentation of mere mental bric-a-brac for what it really is. University people who regard themselves as liberals point to the selfishness and egotism of a capitalistic society resulting from the emphasis on material acquisitiveness—and it is detestable. But they are frequently blind to the fact that a brother in the blood stands boldly by his side—the selfishness and egotism resulting from the false processes of intellectual acquisitiveness—and that a society suffering from material egotism will not be saved by a class trained in intellectual egotism.

The world lies about you as a thing of beauty, which you do not have to acquire. The world of legal learning is here in identically the same way. You should look at it, should become thoroughly acquainted with it, and by holding a right attitude of mind, should come to love it. When you come to love it with a free mentality, unencumbered by any selfish desire to own it, as much of it will be yours as you need, and when you need it. This freedom is something the drudge mind never acquires. Nor can it even understand how it can be.

The happy thing about the life of the lawyer is that he may come to think objectively and impersonally, because the fine discipline of his rigorous life in the practice emancipates him from false gods. My thesis tonight is that you should begin to shake loose your shackles while in the law school. The essence of the free mind, and of the able mind, is a certain selflessness. "Humility is the beginning of wisdom," and that humility the lawyer acquires who matures. His dogmatic certitude gradually fades. He comes to see that the law is not an exact science. And while he has a great regard for, and interest in, the law, any egotistical inclination to be proud of what he has acquired of it eventually fades out. The bigger he is, the less pretentious he is. As he matures he claims to know less about the law and becomes a better lawyer by the process. Of the few eminent lawyers I have happened to know, none had any intellectual pride. They appreciate that the law is of purely finite character; that logic is not divine, that it works equally well for devil or saint; that, as Aristotle said, "Only an amateur expects exactitude in life;" that one should never fail to know, as exactly as one may, every bit of the law there is with reference to his problem; but that one should not confuse case learning with wisdom, mere intellectual cleverness with power. As the lawyer matures, it is the common experience that he expresses himself more simply, avoids long sonorous sentences and many syllabled words, and tries to win his case through the simple statement of the truth rather than through a "learned" brief, redundant with the citations of alleged authorities. May we not have the same simplicity and humility in the law schools? Why should we have anything else?

Mr. Emerson said, "Nothing, at last, is sacred but the integrity of your *own* mind." The free play of your innate and natural intelligence—and that is your "*own* mind"—is your real being and the thing by which you are to come, if ever, into the stature of your real selfhood. In order to provide the food essential to enrich your consciousness, it is well to know what the thinking of man has produced in your chosen field. But it is essential, if you are to maintain your own integrity, that you do your own thinking. And it is destructive of that integrity, if you swamp your own individuality with the thinking of other men, which if it ever was real thought, was the expression of *their* minds with reference to their problems. Here is the great vice of dependence upon precedent and of deference to mere human personality and opinion. The academic world is always loudly claiming more independence of thought than is found in the outside world. But every time a Brandeis or a Pound walks across the pages of a law review, every letter on the page performs a pretty typographical obeisance. Every time one of these transatlantic "Leviathans" glides quietly out to sea (and both of these men are very able men), all the little puffing tug boats in the harbor blow their whistles so long that they have to suspend traffic for the rest of the forenoon until they can get up steam again. The matured practitioner shows no such deference to frail humanity. Deference to mere personal opinion is no part of the search for truth, for the truth is inevitably impersonal.

That such processes and mental environments warp the mentality of many law students is shown by the appraisal which lawyers make of many men just graduated from law school. They sometimes say that the course at some of our best law schools is "three years in and six years out"—which means that it takes six years to restore the natural resiliency and bounce of a man's mentality, when preserved in the academic salt barrel. They see that there is high danger in academic training of its teaching the student to distrust his native intuition and common sense, by establishing his trust in something external to him, thereby making him untrue to himself. I have frequently heard lawyers complain that the law graduate is too greatly impressed with the false idea that the law is a science and a difficult one; that he continually seeks for authority in the thinking of other people as expressed in decisions or text books, and is incapable of that free play of versatility and resourcefulness, which is the heritage of the untrammelled mind; that his native intelligence is temporarily obstructed by his bad scholastic habits. A free mind knows no precedents. It looks at the problem in a fresh way, and forges its own conclusions in a pattern none other than its own. The truth is alive, and the man who wins lawsuits is the man who keeps his thinking fresh, who forms his thought patterns in something else than the conventional mold. But the drudge mind is the product of that scholastic attitude, by which the chief end of man is to glorify, not divine intelligence, but the intelligence of the instructor, by handing him back the instructor's own thinking, in the instructor's own language.

Now, I am speaking of my own experience. The problem which I had to meet as a young lawyer in escaping from the bad mental habits due to my conventional law school training, was the hardest problem that I have ever met. The training had produced in me, as it does with thousands of young men, a lawyer with a mind as egotistic and brittle as that of an Italian prima donna. Impersonal and objective thought was quite beyond my

capacity. This was the result of the congeries of fear, self interest, deference to transatlantic liners, and a conception of the great difficulty of the law. To those of you who have the responsibility of molding law school traditions, I say that my condition was not my fault. So long as I did work of an unimportant character, I limped along fairly well with my law school mental habits. But when I reached work of actual size, I actually had to discard all of my law school habits and establish new ones, in order to avoid nervous breakdowns after I had had one, and was threatened with a second. Men never break down from overwork. They break down because of brittle minds. The great strength of the tree is in that it knows how to bend.

You may say: You have spoken about the corrosive effect of egotism. Is it not true that some of the most effective men in the legal profession are men of that hardboiled, egotistical type who, by dint of hard work and by processes of acquisition, have taken unto themselves, as the successful business man gathers property or money, the knowledge of the law which has made them a power in their universe?

The reply is: In the infinite variety of examples afforded by human individuals, one may find proof for any thesis. But after observing the mental activity of a great many men, I am sure that human egotism kills more men than bad whiskey. Humility, not human egotism, is the beginning of wisdom. The most efficient mind is an objective and impersonal mind because it is alive and adaptable. The young lawyer's greatest enemy is not his ignorance of the law, but his fear, which is due to our system of scholastic training putting continual emphasis on the personal ego. Yet observe that Jesus said, "Of my *own* self I can do nothing." The Bible says that "Humility is the beginning of wisdom." Lincoln said that he recognized in himself merely a stewardship and an agency. On the other hand, Woodrow Wilson is now commonly recognized as having failed in making effective the very high degree of human idealism, which he expressed in his fourteen points, by his complete inability to get himself out of the way, and to divorce a great ideal from his mere human personality. He held a lamp that had a great light with a clutch so tight that he shattered it. This failure of life to produce a leader big enough to be humble was one of the great tragedies of the war. Lincoln understood life better and would have made no such mistake. Jesus made it plain that the truth is always an impersonal thing, and that its mastery is not properly by any egotistic process. But it seems to me that humility is neither the beginning, nor the end, of much of our scholastic learning.

The dangers in legal dogmatism in a rapidly evolving world, its heavy penalties in the law's past unfoldment, the necessity that the lawyer solve today's problems in a way to reflect the wisdom of the past only if it be today's intelligence, are important considerations clear to every one. But does not our legal training produce the conventional type of thinking which we are well aware we should avoid? The world demands from the lawyer the same quick sensitiveness to the truth which has given the modern scientific mind its remarkable advances. The brittle mind is not the mind of the modern scientist, nor of the modern lawyer. He is continually faced with new problems, and needs the resourceful intelligence which can devise new means of solving them. He has learned from experience that, as Mr. Justice Holmes has said, "certitude is not the test of certainty," that "delusive exactness is a source of fallacy throughout the law," and that the essential nature of most legal controversies is a conflict of contradictory rights, some of which must yield, even when all appear unqualified. Experience has taught him to distrust the dogmatist, who looks to precedent for the precise, when the best fruit of fresh perception is apt to be the unprecedented and approximate.

One of his important functions is in the conduct of negotiations involving conflicting interests. Here it is his privilege and duty to lead a group of antagonists out of the claims of intrenched selfishness, which are usually based upon what are regarded as "rights" but which have no such definite substance, along lines of conciliation to settlements which express a higher right than the attrition and expense of court controversy are apt to produce. We daily observe the courts' battlefield strewn with debris which expresses, not the courts' mistakes, but the stubbornness of the brittle minded lawyer, in insisting upon the egotistic assertion of "rights," which from a more objective viewpoint should have been seen as claims. In controversies where results are needed in accord with good business judgment, or in accord with a true conception of right relationships between the client and the public or the government, the dogmatic lawyer insisting upon technical rights is apt to do great harm. Especially before the administrative tribunals, we have frequently seen the progressive advance of great industries, and their right relationships with the public and with the government, obstructed through the technical controversies of the lawyers, waged through the insistence upon the unyielding and the exact with reference to the indeterminable and inexact—lawyers representing the public quite as much as those representing the industries. These are failures of our profession, failures to which our methods of legal education are a contributing cause. As a profession we need to learn the ways of peace and that humility is the frequent beginning of fine victories where egotistical insistence fails. When a man ceases to proceed egotistically it does not mean spineless negativity. It means that for the first time he finds the full measure of his real efficiency.

Now I am somewhat disturbed about this speech, for it has not a single inch of annotations and so no shred of scholastic respectability. I must cure this by quoting some profound and resounding authority. I shall end by quoting from a Chinaman. This is from the works of that great medieval metaphysician of the 3rd Century, Tao San. You might have some trouble to find it in the books for he was brought into being for the purpose of this occasion.

> Weary, I asked of Tao Lung, "*Where* is magnanimity?" He was then old. He said:
>
> "I knew not until my third wife came, the lovely Looan Tou, in whose untutored and, so, untired, eyes the light of wisdom lay. I said,
>
> 'Even the crazy goose wings north each spring upon his appointed way, as though upon the winds of destiny; while I, the most learned of my time, like a dry and withered lily pad,

am tossed about my garden by every wind that blows.'

And she said, 'He sits in darkness, who holds unto himself, as though he owned, his paltry lamp with guttering flame. Come with me into the garden, where the plum trees bloom, and where the sun, majestic and unowned, surveys the all it owns.'"

And, in conclusion, may I ask, where *is* Magnanimity?

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

COMPULSORY Arbitration of International Disputes. By Helen May Cory. 1932. New York: Columbia University Press. Pp. xiii, 281.—This volume is an extraordinarily precise statement of bilateral and multilateral experience with the idea of the compulsory arbitration of international disputes in the 19th and 20th centuries. With a restraint seldom exhibited in this field, Miss Cory has kept her text confined to her title. Examination of the treaty product since 1820 provided the material for what amounts to a historical narrative of the development of the ideas of compulsory arbitration, for there have been two. The practice of arbitrating was at first voluntary and *ad hoc* to the specific dispute. Treaties obligating states in advance to arbitrate disputes were before the Great War referred to as compulsory, and emphasis was laid upon the scope of the categories of the disputes to be so treated. Since the Great War and the existence of the jurisdictions of the League of Nations and Permanent Court of International Justice, compulsory arbitration has implied reference to a dispute by unilateral state application, with an incidental restriction of the excepted questions.

Bilaterally and multilaterally, there have been some two dozen styles of compulsory arbitration in the broad sense of a system of pacific settlement in which the pronouncement has binding force. For the first time, Miss Cory identifies each of these types, showing how their operative clauses have progressively affected the development of jurisdictional scope. The accuracy of this analysis makes the book a contribution to historical jurisprudence.

The postwar period is overshadowed by the Optional Clause establishing the compulsory jurisdiction of the Permanent Court and the rapid increase of the compromissory clause. Between publication and the writing of this review the parties to the Optional Clause have risen from 37 to 42 states which are subject to unilateral suit within the terms of their subscribing declarations. The increase in number of compromissory clauses is rightly regarded as "the most encouraging development of the postwar period," but the existing number of them, given as 300, is a considerable understatement. The value of compulsory arbitration is defined as removing that uncertainty as to the intentions of states which obstructs an international sense of security.

Reservations to bilateral and multilateral treaties have been greatly reduced and simplified, but in their nature provide loopholes of escape. Miss Cory rightly comments that the new exception of "domestic jurisdiction" plays the same part as the obsolete "vital interests," but does not mention that "domestic jurisdiction" is a legally determinable fact at any given time. The Optional Clause bases jurisdiction upon the existence of a "legal question," which is still undefined internationally. The compromissory clause obliges the parties to a treaty, which defines their engagements, to submit their disputes arising under it to arbitration; by its use in all fields of international relations and frequent reliance upon it, states are becoming habituated to conducting their affairs within the conception of law.

Boston. DENYS P. MYERS.

Aron's Notes on Proof: The Probative Law. By Harold G. Aron. 1932. New York: Georgic Press. Pp. xxiv, 561.

Handbook on the Law of Evidence. By John Jay McKelvey. 1932. St. Paul: West Publishing Co. Pp. xix, 576.

That there is a growing need and demand for a change in our court procedure and in the production of proof is indicated in two recent books of decidedly dissimilar techniques of approach. The Fourth Edition of McKelvey's *Handbook on the Law of Evidence* treats the subject in the traditional Hornbook manner, being concerned primarily with a brief "presentation of the law of evidence with respect to its origin, growth, and present status." It is a distinct improvement over former editions of the work, adding, as stated in the preface, "some material indicative of the current trend of the Law of Evidence towards a maturity less rigid and more in harmony with (to quote the words of Professor Wigmore) 'the idea

that back of all specific rules of evidence is the grand purpose of reaching a correct verdict.'"

In spite of the fact that the preface contains a somewhat scathing arraignment of our present system and an indication therein of a preference for certain designated reforms and a desire for legislative investigation leading thereto, the book, as a whole, approaches the subject in a thoroughly orthodox manner. Some reference is made to law review articles, but more complete reference would add materially to its value.

Aron's *Notes on Proof* is *sui generis*. It is difficult of classification. In places it approaches the status of a modern orthodox text book, in its digestic statements of law and reference. In other places it becomes a collection of maxims, a treatise on legal philosophy—at times almost startling—a legal dictionary and even a thirty-five page table of contents of the New York Penal Law, as the fancy of the author dictates.

In makeup, generally in subject matter, and in philosophy and theory it is usually unorthodox, unconventional and dogmatic. Even in the mechanics of the book, the author's fads of punctuation often make his meaning difficult of ready comprehension by one more servile to ordinary rules.

In some respects the book is fragmentary. This, as in the case of some of the other characteristics heretofore mentioned, may be accounted for by the method of approach, indicated by the title "Notes on Proof," and does not necessarily offer a ground for criticism.

One may easily differ with the author regarding some of his suggested reforms and some of his criticisms as well as some of his assertions as to substantive law, or at least question their soundness. It is doubtful if the generally adopted division of law into the two-fold arrangement of Substantive and Adjective Law would be improved upon or simplified by a redivision into a three-fold arrangement of Substantive, Adjective and Probative Law. A reading of the author's plan seems to make complexity more complex without creating a compensating benefit.

The author's observations relative to the jury system do not meet our full approval, particularly where he states that "as long as laymen are judges of the facts the continental system of free proof and disregard of any rules of admissibility is sound and logical." Many have felt that the reverse is true, and that one of the main reasons for retaining rules of admissibility is the fact that we have juries. The rules of admissibility have therefore been considerably modified, or at least applied with leniency, in equity proceedings where a judge determines the facts.

The following statement of the author compels our disapproval:

> "There are principles governing the introduction and exclusion of evidence; there are no rules and there is no law of evidence."

It would seem that a principle, definitely and by compulsion adhered to, becomes a law or a rule. Any lawyer who has had a case reversed on account of error in the admission of evidence will probably corroborate this.

The author's conception of criminal law is unique, as indicated by the following quotation:

> "There should be only one criminal law enforced by any sovereignty, and it should be in this form: Any person committing the following acts shall be subject to trial as to his fitness to remain a free member of the sovereignty, state or county, as the case may be." (Presumably the acts are to be enumerated here.)

Would this involve a prison sentence in every case, major or minor? Who is fit to determine such "fitness"?

The author, like many another, is frankly very critical of our rules of evidence, in which position he has a large and increasing group of fellow critics. That there is some basis for this feeling is true, but in our opinion it is carried too far. The rules of evidence have grown out of centuries of thought and experience, of countless instances of trial and error. We know of none that were not based upon fixed principles, mainly justifiable. It is true that times and conditions have changed, but human nature, to meet the needs of which the rules of evidence were largely formulated, has undergone no great basic change. Undoubtedly some changes are desirable, but the effect of a change should be carefully studied before the change is made. Newness and novelty do not necessarily indicate virtue, nor does age alone prove vice.

Now for the other side of the picture. The author has launched an inquiry into one of the most difficult and intricate fields of the law. He has attacked the problem in a fearless manner, and his criticisms have been constructive as well as destructive. While we do not agree with some of his statements of law and some of his legal philosophy, he nevertheless has shown an amazing versatility and an exceptionally broad knowledge of the law. The amount of time and energy expended in the preparation of the work must have been enormous. An outstanding feature of the work is the annotated description and dictionary of common legal terms covering seventy pages of the book, with nearly eleven hundred citations thereto. The effectiveness of the citations and notes cannot be passed upon in this review, as they are all in a separate supplement, to be released after the publication of the book, and not yet in the hands of the reviewer. An admirable feature of the book is that the supplement is to be revised each year. The author's treatment of the subject is thought-provoking. The discussions and the numerous citations should generally form a valuable basis for brief making. The book should be read by every lawyer and every law student. By and large, in spite of some imperfections and fallacies in the book, it must be said that the author has made a rich and notable contribution to legal literature.

Drake University. SCOTT ROWLEY.

Taxation of Foreign and National Enterprises in France, Germany, Spain, the United Kingdom and the United States of America. 1932. Geneva: League of Nations. Pp. 275. As both big and little business become more international in scope, problems of double taxation assume increasing importance. The League of Nations has been giving constant attention to this question. Conventions have been drafted with a view to the abolition or attenuation of double taxation by assessing local profits only or by allowing deductions from the tax for taxes paid elsewhere.

But what are local profits? The allocation of profits is dealt with differently in practice by the tax systems of the world. An enquiry, financed by the Rockefeller Foundation, was therefore instituted by the League in order to draft uniform rules of allocation and the present volume embodies this preliminary

study. The individual chapters are written by local authorities (the United States authors being Joseph Weare and M. L. McMorris, of the treasury department) and are preceded by a General Summary by Mitchell B. Carroll, former special attorney in the United States treasury, who was selected to direct this Enquiry on Allocation Methods.

Increased taxes entailed by the world depression in every country soon make a book of this character outdated in some particulars, especially as to rates of taxation. The American reporters, for instance, deal with the Revenue Act of 1928. But certain fundamental characteristics, methods and points of view remain relatively permanent, so that this volume does not cease to have a practical value for the international practitioner. The lawyer of today has no more difficult problem than that of advising his client how best to attempt to avoid unjust double taxation, an ungrateful and sterile task by reason of the fact that tax systems are more or less arbitrary and assessments in practice are oftener arrived at by empirical methods and friendly adjustments than by principle. Revenue officers are more interested in extracting the maximum permissible under the law than in attaining justice or adhering to fixed principles. Intercompany and interoffice transactions present countless opportunities, well illustrated in this book, for switching profits from one office to another. Even the most reputable taxpayer will beat the tax if he can do so with little risk. In order to frustrate evasions, tax officials are likely to go to the other extreme. The foreign taxpayer is, in practice, at the mercy of the administration. It does not pay a subsidiary or branch of a foreign company to litigate, still less to incur the ill will of the local officials.

Except in Spain, a branch or subsidiary of a foreign company is normally subject to tax on the basis of its own separate accounts. The exceptions in general are designed to foil evasions. Spain, however, normally disregards the separate legal existence of a subsidiary company, treats the enterprise as a whole, a single economic unit, and bases its tax on a fractional apportionment of the business of the branch or subsidiary as compared with the profits of the whole enterprise, and it attempts to safeguard the taxpayer by the organization of a "jury" of bankers and experts, independent of the tax authorities. France employs this system of fractional apportionment for income from securities. The Spanish reporter (Prof. Agustin Vinuales) argues strongly the point of view that his country's system is the only just system, but those who have had experience with the complexities and formalities of Spanish tax procedure will be inclined to feel that the price of abstract justice, on paper, may be too high.

The individual reports all close with recommendations for the consideration of the League's fiscal committee. It is evident that much has to be done before a general agreement can be reached.

New York City. PHANOR J. EDER.

China Speaks on the Conflict Between China and Japan. By Chih Meng. 1932. New York: The Macmillan Company. Pp. xx, 211.—In this compact little volume the student of Far Eastern affairs finds China's side of the dispute with Japan set forth with relative clarity by the Associate Director of the China Institute in America. To his aid have come His Excellency W. W. Yen, late Chinese Minister to the United States and recently appointed Ambassador to the U. S. S. R., and Professor W. W. Willoughby of Johns Hopkins University, sometime adviser to the government of China. By the pens of these distinguished gentlemen are contributed introductory notes of value almost equal to that of the book itself.

As intimated, this study does not purport to offer an impartial analysis of the factors lying behind the outbreak in Mukden of September 18-19, 1931. It is frankly a one-sided statement somewhat hastily, but, on the whole, well, prepared to popularize for Western consumption the case of the defendant. Contemporaneously there appeared a complementary volume dealing with Japan's arguments composed by a Japanese publicist.

Correctly does Dr. Yen remark: "On the night of September 18, 1931, Japan startled the world by suddenly launching her great war machine against China. There was no warning; there were no diplomatic preliminaries; no attempts to discuss alleged grievances or to negotiate. Since then the sky of the Far East has been red with the glare of burning cities and villages; and the tramp of Japan's armies and the thunder of her guns have been heard throughout Manchuria, at Shanghai, at Nanking and elsewhere in China. . . . Historically and sentimentally, Manchuria has been part of China for centuries and it is the home of millions of Chinese. . . . Economically, Manchuria is destined to play a very important role in the industrial development of China. . . . China, no less than Japan, is faced with the problem of surplus population, especially in the provinces along the coast. . . . Strategically, Manchuria is absolutely vital to China's security. . . . If Manchuria is spoken of as the first line of defense of Japan, what about China? Where is China's first line of defense and where is China's second line of defense?"

Equally succinctly does Professor Willoughby remark that "with regard to Manchuria, Japan, for a generation, has exhibited, in the clearest manner, a determination to extend not only her economic interests but her political control. In this connection it is significant to observe that, at the Washington Conference Japan made practically no specific concessions as regards Manchuria. She did, indeed, concede that Manchuria was an integral part of China, and did agree 'to respect the sovereignty, the independence, and the territorial and administrative integrity' of China, but it is clear that she did not abandon her desire and intention to bring Manchuria under her substantive, if not formal or technical, political control. Japan's recent acts have, therefore, a deeper significance than, perhaps, they would otherwise appear to have.

While conceding that the South Manchuria Railway has aided in the economic development of Manchuria, Dr. Willoughby calls attention to the fact that it was one of the spoils of war and that "it cannot be proved that the railway would not have been a powerful economic instrument in the hands of the Chinese." He is doubtful of the motive of Japanese "philanthropic efforts" and draws attention to Japan's "powerful, and, in a number of cases successful, influence in the preventing of other needed railways in Manchuria." As to Nippon's complaint of "inadequate security for her nationals and their property in China," he truthfully remarks that "many more Chinese living in Japan and Japanese-governed Korea have lost their lives through lawless violence than have Japanese living in China. And, in this connection, there is to be noted

the remarkable immunity from personal violence of Japanese nationals living in other parts of China following the Japanese invasion of Manchuria. . . . "

Dr. Willoughby wisely directs the attention of the Western world to the distinction between the claims of Japan respecting the remissness of China prior to September, 1931, and the acts of Japan "in attempting to correct her conceived grievances." It is the latter with which the League of Nations has at present to deal, and in which the civilized world is now vitally interested.

In twenty chapters, accompanied by ten appendices, Mr. Meng reviews the relations of China and Japan from 1894 to 1932. After a brief introductory description of Manchuria—"nature's favorite,"—a popular sketch of the entrance upon the scene of Russia and Japan, with consequent numerous "incidents," is given. Part II, chapters XI-XIV, offer a running account of the background of the Mukden outbreak, the occupation of the Three (or Four) Eastern Provinces, the declaration of Manchurian "independence," and the Shanghai war-which-was-not-a-war of 1932. The concluding section attempts an interpretation of the significance of the problem as a whole.

Taking into account the conditions prevailing at the time the book was compiled, and the nationality of the author, the tone is surprisingly cool. To be sure the large number of quotations from the contemporary press of the West are chosen, with extreme care, but this is only natural. In general the observer of Eastern affairs will cavil less at what is said than at what is omitted. For example, the generally obstructive tactics of the Chinese government and its diplomats are not unduly stressed. On page 92 the declaration is made that "The Chinese economic boycott is the direct result of Japan's military occupation of Manchuria." Mention is not made of the eight anti-Japanese boycotts which preceded that of 1931. Such statements, too, as those (p. 131) attributing "800 years of peace" to China under the Chou dynasty, and "stability for over two centuries under the Ching dynasty" leave something to be desired from the standpoint of accuracy.

Mr. Meng's study should be read in connection with others such as the Lytton Report and Lattimore's *Manchuria Cradle of Conflict*. China in "speaking" tells the truth, but not the whole truth, and it might be considered an exaggeration to say that it tells nothing but the truth. The work falls into the category of those prepared for a purpose and published too early to be complete. It is of value as containing a restrained but one-sided introductory description of an extremely complicated question—to which more Americans should pay more attention than at present appears to be the case.

HARLEY FARNSWORTH MACNAIR.
University of Chicago.

The Masquerade of Monopoly, by Frank Albert Fetter. 1931. New York; Harcourt, Brace and Company. Pp. 466.—In this volume Dr. Fetter, Professor of Economics at Princeton University and a past President of the American Economic Association, launches a counter-attack against those publicists who have been advocating a substantial modification of the anti-trust laws.

He makes a fervent plea, in picturesque language, for a stricter enforcement of the Sherman and Clayton Acts, basing his theme upon the view that up to the present time only half-hearted attempts have been made to administer these laws.

The author, who is admirably qualified, presents clearly and forcefully what he deems to be the true economic, and proper legal, essentials of the concepts of free competition, markets, and monopoly.

Introducing an analytical economic inquiry, as distinguished from a mere legalistic one, the author lays special stress on what he emphasizes as the neglected economic aspects of some of the most important anti-trust cases that have come before the Supreme Court. He dissects critically the United States Steel Corporation case and some of the trade association cases in which the contentions of trade associations were upheld by the courts.

In this connection, he points out that the most flagrant species of economic exploitation and discrimination against consumers and localities arises from the unjustifiable method of quoting on the basis of delivered prices, instead of a combination price composed of a mill base price plus freight to the point of destination.

The Courts, he argues, were either led astray or missed the point in many of the anti-trust cases, by failing to recognize the baneful effects of the practice, uniform in many industries, of either quoting delivered prices or prices related to basing point systems. It is contended that at least equal in importance to the presence or absence of price fixing agreements, were methods of quoting delivered prices carried on either by agreement among competitors or under threat of reprisals against so-called independent competitors by powerful market leaders.

A great part of the volume contains an elaborate examination of the "Pittsburgh Plus" method of price quotations which, the author seeks to demonstrate, escaped the attention of the Department of Justice in the Courts and remained masqueraded for many years, until its true nature was disclosed in hearings before the Federal Trade Commission.

The final conclusion of Dr. Fetter that the anti-trust laws should not be amended and must be more rigorously enforced, seems more doubtful today after several years of depression, and the theme is undoubtedly out of harmony with prospective developments.

In the opinion of the reviewer, the work suffers from an overemphasis upon the predatory aims of both big business enterprise and trade associations. The author's spirit is that of a crusader. The picture he paints is too black, with scarcely any redeeming features. Without minimizing the abuses of business prior to the adoption of the anti-trust laws and even prior to 1929, it cannot be denied that American industry today is confronted with the problem of agreeing upon and pursuing protective measures designed solely as a means of survival. Under present circumstances, producers do not have the power, even if they were so inclined, to make a prey of consumers. Indeed, it is the producers who are at present heavily handicapped in the competitive situation.

The Appalachian Coals case indicates very clearly that the Supreme Court, in appreciation of the turn of events, has departed, temporarily at least, and without the aid of Congressional enactments, from its own canons of strict construction and rigorous application of the Sherman law.

Dr. Fetter represents a point of view more prevalent in trust-busting days. It constitutes an antidote

to the extreme views of the interested champions of virtual destruction of the anti-trust laws. But it seems to this reviewer that the fervor of the argument and the uncompromising conclusions of the author incline to a severity of outlook ill fitting the present situation.

BENJAMIN S. KIRSH.

New York City.

A learned correspondent writes us:

"I enjoyed Mr. Hapgood's review of Beveridge. The review, however, which occasioned considerable comment in the office is Dean Wigmore's review of Mr. Beck's book. In the first place, we believe that the Dean fell into a non sequitur. He states that the Executive Departments are the most efficient and it is from that part he seems to think it follows that an extension of executive control over matters which have previously been handled by the Judiciary is a good thing. His conclusion follows, of course, if efficiency is the sole test, but we should be very much surprised if the Dean really meant that. The second point is that in the first sentence of the second to the last paragraph he states that he disagrees with Mr. Beck's views on bureaucracy in the *third* sense. The third sense, as the Dean enumerates it in the previous column, is the excessive assumption of governmental function by the Federal Government. In discussing the third sense he says that this tendency . . . includes the whole *bad* tendency to look to the Federal Congress. . ." Now if the Dean thinks that this is a bad tendency, as does Mr. Beck, we cannot see why he states that he is in total disagreement with Mr. Beck in his views on bureaucracy in the third sense. We are wondering whether there has not been a mistake and that what the Dean means is that he disagrees with Mr. Beck as to the first sense. We are wondering if you can help us out on that point."

Leading Articles in Current Law Reviews

Yale Law Journal, May (New Haven, Conn.)—Landlords' Claims in Reorganizations, by William O. Douglas and Jerome Frank; The Gold Clause in Private Contracts, by George Nebolsine.

Minnesota Law Review, May (Minneapolis)—The Making of a Contract of Insurance in Minnesota, by William L. Prosser; The Scientific Detection of Crime, by Newman F. Baker and Fred E. Inbau.

Georgetown Law Journal, May (Washington, D. C.)—Is Economic Planning Constitutional? A Re-Examination of the Concept of Public Interest. Parts VI-X, by Louis B. Boudin; Roman Law in the Works of St. Augustine, by Rev. Francesco Lardone; The Use of Statutory Materials in the Teaching of Equity, by Sidney Post Simpson.

Illinois Law Review, May (Chicago)—Studies in Realty Mortgage Foreclosures: V. Reorganization, by Homer F. Carey, John W. Brabner-Smith; The Joinder of Actions in Continental Civil Procedure, by Robert Wyness Millar; Problems of a Committee on Grievances, by Stephen Love; The Constitutionality of Declaratory Judgments, by Albert Russell Ellingwood.

Virginia Law Review, May (University, Va.)—Corporations and Diversity of Citizenship, by Charles Warren; Cicero's Hints to Advocates, by H. B. Schermerhorn; Some Realistic Reflections on Some Aspects of Corporation Reorganization, by Jerome N. Frank.

Harvard Law Review, May (Cambridge, Mass.)—Moratory Legislation: A Comparative Study, by A. H. Feller; The Functions of Judge and Jury in the Interpretation of Statutes, by Frederick J. de Sloovère; Adoption and Rejection of Contracts and Leases by Receivers, by Ellsworth E. Clark, Henry E. Foley, Oscar M. Shaw.

Columbia Law Review, April, (New York City)—Reorganization of Railroad Corporations under Section 77 of the Bankruptcy Act, by Churchill Rodgers, Littleton Groom; Currency Control and Private Property, by John Hanna; Judicial Relief for Insecurity, by Edwin M. Borchard.

Michigan Law Review, May (Ann Arbor, Mich.)—Fraudulent Concealment and Statutes of Limitation, by John P. Dawson; State Regulation of Interstate Motor Carriers, by Paul G. Kauper.

Air Law Review, April (New York City)—Stephen Davis, by Bethuel M. Webster; The Law of Nuisance as Applied to Airports, by Randolph W. Childs; The Airport Approach, by Charles C. Rohlfing; The Air Codes of the Union of Socialist Soviet Republics, by I. S. Pereterski.

Tennessee Law Review, June (Knoxville, Tenn.)—Declaration of Rights Without Consequential Relief, by William H. Wicker; The Benefit Theory of Taxation, by D. T. Krauss; A Unified and Self-Governing Bar, by Edson R. Sunderland; Federal Regulation of Hours of Labor in Industry, by Clarence A. Miller; Forms of Action in Tennessee, by Joseph Higgins.

Tulane Law Review, June (New Orleans, La.)—Hierarchy of Sources and Forms in Different Systems of Law, by Roscoe Pound; Prize Law Procedure at Sea—Its Early Development, by Francis Deák and Philip C. Jessup; Firearms and Legal Doctrine, by Fred E. Inbau; The Yellow Dog Contract in its Relation to Public Policy, by Clarence E. Bonnett.

Notre Dame Lawyer, May (South Bend, Ind.)—Colonel William J. Hoynes, by Thomas L. McKevitt; Common Carrier's Negligent Delay Plus Act of God, by Ralph S. Bauer; Legal Pedagogy or What Have I? by Joseph H. Beale; Lord Hardwicke's Contribution to the Law of Executory Trusts, by Dr. Brendan F. Brown; Congressional Legislation Affecting Railroad Employes, by Leo J. Hassenauer; The Paradox of Law and Liberty, by Charles C. Miltner.

Rocky Mountain Law Review, April (Boulder, Col.)—Some Legal Aspects of the Farm Mortgage Foreclosure, by Royal C. Rubright; The Debates of the Constitutional Convention on the Jurisdiction of the Supreme Court, by Erwin F. Meyer; Duress, Undue Influence, and Mistake in Colorado Contracts, by William E. Lester.

Kentucky Law Journal, May (Lexington, Ky.)—Death by Wrongful Act—Survivorship of Tort Actions in Kentucky, by Alvin E. Evans; Manufacturers' Liability to the Ultimate Consumer by A. J. Russell; Agency, General and Special, by Basil H. Pollitt; Regions versus State, by Amry Vandenbosch; The American Law Institute's Restatement of the Law of Contracts Annotated with Kentucky Decisions (Continued), by Frank Murray.

The Canadian Bar Review, May (Toronto, Ont.)—Parliamentary Status and Provincial Legislatures, by Wilfred Heighington; The Stage of Equity, by Sidney Smith; Nova Scotia's Blackstone, by D. C. Harvey.

United States Law Review, May (New York City)—Constitutional Limitations and the Gold Standard, by Frederic A. Johnson; A Trust Company Draws a Trust Deed, by Albert Hirst.

Indiana Law Journal, May (Indianapolis, Ind.)—The Lawyers' Duty to the Public, by Will Shafroth; The Supreme Court of Indiana and Federal Taxation of State Instrumentalities, by Alden L. Powell; International Congress of Comparative Law, by Alexander M. Bracken.

Oregon Law Review, April (Eugene, Ore.)—Montesquieu and the Separation of Powers, by James T. Brand; The Restatement of the Law of Contracts with Oregon Notes (Sections 120-132, Chapter 5), by Charles G. Howard.

St. Louis Law Review, April (St. Louis, Mo.)—Restatement of the Law of Contracts with Missouri Annotations, by Tyrrell Williams; Jurisdiction over Foreign Corporations, by Edward S. Stimson.

Idaho Law Journal, March (Moscow, Ida.)—The Effect on the Formation of a Contract of a Telegraphic Mistake in an Offer, by John D. Ewing; Attorneys as Officers of the Court, by Guy W. Wolfe; The English Police Court as a Court of Family Relations, by Albert Lieck.

THE UNITED STATES CUSTOMS COURT—II

The Continental versus the American Mind as Shown in Provisions for Judicial Review of Administrative Action—Nature of the Customs Classification Remedy—Court's Jurisdiction Includes Almost Every Possible Legal Controversy Which May Arise between Importing Taxpayer and Government Concerning Rate or Amount of Duty Paid—Some Important Cases

By Hon. George Stewart Brown
Judge of the United States Customs Court

The Continental Versus the American Mind

THE Continental mind works differently from the Anglo-Saxon mind. The development of their respective systems of public law is a good illustration of the difference.

The Continental mind worked out logically on principle the necessity of a judicial review of administrative action to protect the liberty of the citizen, while the Englishman and the American merely invented remedies in piece-meal, and more or less imperfectly, as the necessity or the popular demand for some particular remedy arose.

So we find in France and some of the smaller Continental countries a well-defined plan with a logically developed system; sometimes through special administrative courts created for the purpose, a special forum having a wide and comprehensive jurisdiction for the remedy of individual wrongs arising from executive action.

In England and America the ordinary courts have been given, in a limited class of subjects, a special jurisdiction to meet the particular public demand for such reform, along some particular line where the abuse from the absence of the remedy was flagrant, or where the courts themselves have from sheer necessity, without statutory authority, sustained the right to sue the tax collector at common law, or have applied the original common law writs of mandamus and prohibition.

Where special tribunals like the United States Customs Court or the Court of Customs and Patent Appeals, or the Court of Claims, have been created their jurisdiction has usually been of a special and limited character to cover some particular class of subjects.

Under the common law writs, mandamus, prohibition and the writ of right, all of which were invented or adopted by the English courts to give some judicial review of the legality of the acts of public officers, as a rule, the remedy is limited to the correction of errors of law and does not include errors of fact. Moreover, if a discretion is expressly confided by the terms of the law to the official, such discretion can not be reviewed by the court on such writs, but the court can only correct an abuse of discretion. Further, as a rule, such writs lie not as a matter of absolute right, but issue in the sound discretion of the court.

Consequently, a judicial review by means of such writs, and the kindred writ of injunction, is not always fully effective. To procure a full, adequate and complete remedy, an appeal covering all questions of law and fact involved in the decision complained of must be provided by statute, of which, I suppose, the appeal provided by the customs administrative act is probably the best particular example.

French Administrative Law

LaFerrière, in his "Traité de la Jurisdiction Administrative et des Recours Contentieux," states the general principle upon which the jurisdiction of the French courts over certain administrative contests is founded, as follows (Vol. 1, page 6, par. 2) (Free translation):

"It results that with resistance set up in opposition to the acts of the administration or an act of public authority founded on a right which the administration may have disregarded, upon an error of fact or of law which it may have committed in its relation with the citizen, . . . and which may have resulted in the violation or erroneous application of the law or of an existing right. If the injured party thinks himself justified in opposing his individual right to the right invoked by the administration, there is a subject matter for contest, for litigation; an administrative contest is immediately created by the conflicting claims; judicial action is necessary to resolve the difficulty. In other words, the offended interest involves only the idea of utility, of expediency, of policy, whereas the disregarded right involves the idea of justice, of legal sanction, of a judicial determination. In the first case, the injured party can only beg and complain; in the second, he can require verification of his right and demand that it be respected."

It is upon the basis of such theoretical definitions as this that the Continental jurisdiction appears to have been worked out. Speaking of the French system, in "Principles of Constitutional Government," Dr. Goodnow says (page 240):

"The French system has proved itself to be more effective in the protection of the individual, not only because of the law which the administrative courts have developed, but also because of the more simple and less expensive remedies which have been provided. Much of the procedure in the Anglo-American courts is extremely technical, and on that account expensive, because the litigant must retain the services of a highly paid lawyer. Most of the remedies provided by the French law

are simple and a lawyer's services are often not required."

In England the common law action against the collector is distinctly recognized.[1] Decisions of customs cases brought to procure a refund of excessive duties appear in many of the law reports in the British Colonies.

Our own statutes relating to the Philippine Islands provide for a court review there, and a number of customs cases have been decided by the Philippine Supreme Court.

In the preservation of "equality before the law" the right to go before a judicial tribunal independent of the executive and there obtain relief from the illegal levy of a tax by the administrative official is fundamental.

Nature of the Customs Classification Remedy

The executive officials take the duty. The importer, whose goods have gone into consumption, has paid it. He must sue to get back the whole or any portion which he claims to have been illegally taken. The suit is instituted by filing a protest against the collector's liquidation. This protest constitutes the initial and only pleading in the case. It must definitely and specifically state the classification claimed to be correct and the error in the Collector of Customs' classification or liquidation. It may be amended upon written motion in the discretion of the Court at any time before the case is called for trial (Rule 38). No answer by the Government is required because the Plaintiff, in order to recover, must affirmatively prove his case, i.e., he must show (1) that the classification or liquidation made is erroneous, and (2) he must show that the classification, weight, or other matter affecting the liquidation, upon which he relies is correct. A motion to dismiss often serves as a demurrer to the protest, as in other Federal courts.

The testimony of the witnesses produced must conform to the strict rules of legal evidence with all the sanctions and protection of other judicial trials. In every respect it is identical with the common law action for money had and received, which it succeded, brought in a State Court for the return of duties claimed to have been illegally exacted, except that the Division of three judges decides all questions of fact as well as law, the common law jury having been dispensed with. If the decision is in favor of the Government the judgment of the Court overrules the protest. The judgment, if for the Plaintiff, results in the return of money held to be illegally exacted as duty, that being the purpose of bringing the suit. No execution, of course, is necessary as all such judgments are paid out of a continuing appropriation for the purpose in the same way many of the money judgments of the Court of Claims are satisfied, as referred to in United States v. Klein, 13 Wallace 128, and held to constitute a binding judgment. In a real sense therefore the Custom Court's judgment executes itself. The absence of conventional execution does not affect the validity and binding force of the judgment. In Mills v. Duryee, 7 Cranch 480-485, Mr. Justice Story said.

"The right of a court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect and have full effect independent of the right to issue execution."

In Fidelity National Bank v. Swope, 274 U. S. 123, Mr. Justice Stone said:

"While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensible adjunct to the exercise of the judicial function."

This principle is affirmed and the authorities reviewed in N. C. & St. L. Ry. v. Wallace decided by the Supreme Court February 6, 1933 (288 U. S. 249). There Mr. Justice Stone specifically referred to the Supreme Court's power to review the money judgments of the Court of Claims "although no process issues against the Government" (page 263). While for convenience the judgment of the Customs Court often takes the form of a direction to the collector to refund the money decided to be due the Plaintiff, it can and does sometimes take the conventional direct money form.[2] Such form was attacked and sustained in United States v. Davis, 54 Fed. 147, per Shiras, Caldwell and Sanborn, Judges.

The subject matter of the suit is a case at law "arising . . . under the laws of the United States" and is also one of the "controversies to which the United States shall be a party," as the United States is always Defendant. These are two of the categories specifically mentioned in Article III of the Constitution to which the judicial power of the United States shall extend.[3] In United States v. Rice, 257 U. S. 536, Chief Justice Taft says:

"This case involves the sufficiency of a protest necessary to justify a suit against the United States for duties illegally exacted."

The United States is Defendant in every classification case,[4] including petitions for remission of penalties and the so-called manufacturers' protest. The manufacturers' protest protests the rate collected as too low and of course does not ask for a money judgment. The United States has consented to be sued under it. (Sec. 516, Tariff Act of 1930). Its nature is explained in the similar suit of Louisiana v. McAdoo 234 U. S. 627, where Mr. Justice Lurton described all customs suits as suits against the United States. Its scope is being litigated in Dutchess Hat Works v. United States, T.D. 45974, motion for retrial T.D. 46124, decided by Division 1 of the Customs Court on January 17, 1933, now on appeal to the Court of Customs & Patent Appeals. The case instituted by the Manufacturers' protest is perhaps the only instance in the law where a citizen, not paying the tax, may litigate concerning the application of a tax law to his tax-paying rival in business and if successful thus increase the tax collected by the Government officials from such rival.

Broad Scope of Custom Court's Jurisdiction

The jurisdiction of the U. S. Customs Court being coextensive with, and the equivalent of, the original common law action in a State court against the Collector of Customs, covers a very wide scope

1. (39 and 40 Victoria, Ch. 36, sec. 34.)

2. Fox River Butter Co. v. United States, T. D. 44007, 59 Treas. Dec., 485; Marine v. Lyon, 62 Fed. 153.

3. U. S. v. Hopewell, 51 Fed. 798 per Gray, Circuit Judge, where the judgment below was a money judgment. See also Anglo-Cal.-Bank v. U. S. 175 U. S. 37.

4. In United States v. Jahn, 155 U. S. 109, Chief Justice Fuller said: "This case was docketed here under the title: 'In the matter of the application of Gustave A. Jahn & Co. upon certain merchandise entered by the "Alps," August 15, 1890,' but the correct title is United States v. Gustave A. Jahn et al., for the reasons given by Mr. Justice Gray in United States v. Hopewell, 5 U. S. App. 127, 51 Fed. 798."

including almost every possible legal controversy which may arise between the importing taxpayer and his government concerning the rate or amount of duty paid. It not only includes the rulings of the Collector himself in liquidating the duty but also "the legality of all orders and findings entering into the same." (Sec. 514, Tariff Act of 1930).

The citizens' right which this remedy protects is a fundamental necessity for the protection of property under a government of law constitutional in form, and must be all inclusive of every kind of legal dispute in order to be effective. When the citizen's money is illegally taken in customs taxes the necessity for a judicial remedy to compel its return is equally great, no matter what official, from the Secretary of the Treasury down, performs the act of taking it. That is why the courts give the remedy a wide scope, and liberally construe it.

The Collector of Customs is selected as the official with whom to lodge the protest which starts the suit. First, because he is accessible to the importer at his home port where the trial is to take place, often a great distance from Washington, D. C. Second, because in his liquidation or decision the Collector communicates to the importer at his home the entire departmental action, by whomsoever performed, in making the administrative rulings which take duty from the importer or refuse him relief from a refund demanded. The Collector was thus chosen for the purpose of making the remedy all inclusive of everything everyone had done, or refused to do, which could be made the subject of a legal contest.

The constitutionality of the action of the President in putting a retaliatory duty into effect by proclamation under the so-called reciprocity clauses of the Act of October 1, 1890, was determined in Field v. Clark, 143 U. S. 649, affirming T. D. 10553. Similarly the constitutionality of the flexible Tariff proclaimed by the President was determined in Hampton v. United States, 276 U. S. 394, affirming T.D. 41478. Rights, under the famous 5 per cent rebate cases, to favored nations under treaty stipulations, involving many millions, were determined in United States v. Pulaski, 243 U. S. 97, reversing T.D. 34246 and T.D. 35508. A reciprocity treaty with Cuba was construed in Faber v. United States, 221 U. S. 649, affirming T.D. 27847. Construction of a commercial treaty with France was had in Altman v. United States, 224 U. S.: 583, affirming T.D. 29279. The legal effect of non-action by the Secretary of the Treasury, who was described by the Supreme Court as the chief administrative officer in the collection of duties, was determined in United States v. Ballin, 144 U. S. 1, affirming T.D. 10336. That the burden of proof was upon the government and not upon the importer upon reliquidation of the collector for fraud after a year, was decided in Vitelli v. United States, 250 U. S. 355. The hearing before the Tariff Commission in the process of executive fixing of a new rate of duty was held to be legislative and not judicial in character, in Norwegian Nitrogen Products Co. v. United States, decided by the Supreme Court February 6, 1933, 288 U. S. 294 affirming T.D. 44824. That a tariff rate could be imposed upon goods imported by a State University was decided by the Supreme Court on March 20, 1933 in Trustees of the University of Illinois v. United States, affirming T.D. 44758, 288 U. S. —. In United States v. Lies, 170 U. S. 628, it was held that if an importer appellant abandons his appeal the Government, which had not appealed, may not insist upon review and reclassification. A Russian Sugar Bounty was held to be a legal basis for the levy of countervailing duty by the Secretary of the Treasury in Downs v. United States, 187 U. S. 496, affirming T.D. 22984, although all Russian sugar producers, whether exporters or not, received the bounty. Similarly a countervailing duty to offset a British spirits rebate was sustained as legal in Nicholas v. United States, 249 U. S. 34, affirming T.D. 35595. Jurisdiction over the question of the legality of charges incident to a customs drawback was sustained in United States v. Jahn, 155 U. S. 109, long before jurisdiction over illegally withheld drawbacks was transferred from the Court of Claims to the Customs Court by the Tariff Act of 1922.

A very intricate and important case was recently decided by Division III of the Customs Court in Porto Rico Brokerage Co. (Inc.) et al. v. United States, T.D. 46199, which arose at San Juan, Porto Rico, involving the constitutionality of a tariff tax levied by the insular government upon coffee shipped from New York to Porto Rico. At the time of the famous Insular Cases in 1901 a suit of this character would have had to be brought in the Insular Court of Porto Rico, as DeLima v. Bidwell, 182 U. S. 1, was brought by a common law assumpsit for money had and received in the Supreme Court of the State of New York. Now, however, such cases are within the customs administrative act, as amended by paragraph N, section III of the tariff act of 1913 and subsequent acts, and must be brought in this customs jurisdiction.[5]

In Gsell v. Insular Collector of Customs, 239 U. S. 93, the Supreme Court held that a writ of error was not applicable under the statutes to a customs case where for full review the facts as well as the law must be considered. Mr. Justice Day said:

> "Such was the uniform method and purpose of review, under all the statutes and procedure, which, so far as applicable, are to be read into the Philippine act, and such is still the policy of the Federal statutes in permitting review of the decisions of the boards of general appraisers in the United States by appeal to the court of customs appeal. By writ of error the review is limited to questions of law—a method of procedure inapplicable to customs cases, where the facts must be considered in order to determine the proper classification of the merchandise and the duty to which it is subject."

Numerous classifications passed upon by the Supreme Court in cases arising in this jurisdiction since the passage of the Act of 1890 in addition to those previously mentioned are cited in a note below.[6]

An application for certiorari was filed before the Supreme Court on May 24th in Sears Roebuck

5. United States v. Porto Rico Coal Co., 17 Ct. Cust. Patent Appeals, 288. Section 514, Part III, Act of June 17, 1930.

6. Stained or painted glass windows, U. S. v. Perry, 146 U. S. 71; Finished gunstocks with locks and mountings, not guns, U. S. v. Schoverling, 146 U. S. 76; Knit woolen underclothes as wearing apparel rather than knit fabrics, Arnold v. U. S., 147 U. S. 494; Manufactures of wool as including worsted goods, U. S. v. Klumpp, 169 U. S. 209; Muriate of cocaine as a medical preparation rather than a chemical salt, Fink v. U. S., 170 U. S. 584; Natural gas as a crude bitumen, U. S. v. Buffalo Natural Gas & Fuel Co., 172 U. S. 339; Boards planed one side and tongued and grooved as dressed lumber, U. S. v. Dudley, 174 U. S. 670; Tapioca flour as tapioca rather than starch, Lung v. Wise, 176 U. S. 156; Taxation of wrapper tobacco in filler bale, Rothschild v. United States, 179 U. S. 463; Certain glass beads as manufactures of glass rather than imitations of precious stones, U. S. v. Morrison, 179 U. S. 456; Glass bottles not coverings, U. S. v. Nichols, 186 U. S. 298; Plaster casts for religious society, Benziger v. U. S. 192 U. S. 38; Carbon sticks unfinished are carbons for electric lighting by similitude, U. S. v. Downing, 201 U. S. 354; Additional duty on Figured Cotton Cloth, U. S. v. Rigga, 208 U. S. 136; The growth

& Co. v. U. S. which challenges the constitutionality of the changed language of the Flexible Tariff as embodied into section 336 of the Tariff Act of June 17, 1930. That case was decided in favor of the Government by the Court of Customs and Patent Appeals in T.D.46086, reversing a judgment by Division II of the Customs Court holding the section unconstitutional and distinguishing the case of Hampton v. U. S. 276 U. S. 394, 61 Treasury Decisions 679, Baltimore Daily Record of April 7, 1932.

On June 3rd, 1933, Division III of the Customs Court decided the cases of Domestic Fuel Corp. v. U. S. and George E. Warren Corp. v. U. S., of great international importance, involving the application of the favored nation clauses in our commercial treaties with Great Britain and Germany as applied to the tax on importations of coal in the Revenue Act of June 6, 1932.

It has often been a subject of surprise to the writer that so few lawyers or laymen are familiar with the simple and reasonable pleading and practice of the customs jurisdiction, or why those studying and seeking improvements in judicial practice and procedure have not made themselves familiar with this customs judicial remedy and the machinery of its operation.

on Mocha Sheep not commercially wool but hair, Goat & Sheepskin Imp. Co. v. U. S., 206 U. S. 194; Metal beads temporarily strung as metal articles, decorated, not beads, Frankenberg v. U. S., 206 U. S. 224; Construction of wine paragraph following old departmental practice, U. S. v. Cerecedo, 209 U. S. 337; Japanese Sake wine by similitude, Komada v. U. S., 215 U. S. 392; Imitation horsehair, cotton yarn by similitude, U. S. v. Eckstein, 222 U. S. 130; Tobacco sweepings and scrap used in manufacturing cigarettes, not waste, Latimer v. U. S., 223 U. S. 501; Loose drilled pearls unset and unstrung, carefully matched for a necklace, are pearls in their natural state, U. S. v. Citroen, 223 U. S. 407; Featherstitch braids as braids and not bindings or tapes, U. S. v. Baruch, 223 U. S. 191; Definition of statuary under reciprocal agreement with France, Altman v. U. S., 224 U. S. 583; Commercial mixture of Sulphuric Acid and Nitric acid held free of duty as Nitric acid, U. S. v. Etna Exp. 256 U. S. 402. More recent cases cited *supra*, p. 337 Amer. Bar Assoc. Jour., June, 1933. See also Drawback, National Lead Co. v. U. S., 252 U. S. 140 and Ex Parte Park and Tilford, 245 U. S. 82, and Cooper v. Dobson, hair of alpaca, goat and other like animals in 157 U. S. 148.

IS THE PROCESS TAX CONSTITUTIONAL?

Opposite Positions Taken on Most Important Piece of Social Legislation Ever Passed by Congress—Taxing Power as Possible Support for Provisions Considered—Pertinent Statements in Wilson vs. New and Block vs. Hirsh—Price-Fixing Aspects of Plan and Decisions of Supreme Court Bearing Thereon—Other Arguments against the Section Considered

By Kingman Brewster
Member of the Washington, D. C., Bar

On April 13, 1933, Senator David A. Reed of Pennsylvania challenged the constitutionality of the process tax section of the Farm Relief bill (H. R. 3835) in the Senate of the United States.[1] In the discussion this able constitutional lawyer stated:

"Mr. President, I have said that I am not going to weary the Senate with a long discussion on constitutional points, but I want the Record to show that those points were raised, that we who are sworn to respect the Constitution, to uphold and defend it, had our attention called to the points while the matter was still open for us to reach a different conclusion."

The Senator then raised as constitutional objections to the bill the following:

(a) It fixes prices on articles that are not of public use.

(b) It taxes one citizen for the benefit of another.

(c) It gives the Secretary of Agriculture regulatory powers over businesses not affected with a public use.

(d) It delegates taxing powers to the Secretary of Agriculture.

(e) It denies equal protection of the laws.

(f) It violates the "export" clause of the Constitution.

On the following day Senator John H. Bankhead of Alabama accepted the challenge of his Pennsylvania Colleague and spoke in some detail on the constitutionality of the process tax provisions of the bill.[2]

Thus we have two eminent constitutional lawyers taking opposite positions on what must certainly be conceded to be the most important piece of social legislation which has ever emanated from Congress. With such imposing counsel on either side of the question the final "guess"[3] as to the constitutionality of the statute must be left to the Supreme Court.

However, a brief discussion as to the possible outcome of the law is attempted. It is believed that all of the vital constitutional questions involved in the Farm Relief part of the law are brought to the foreground by Section 9, entitled "Processing Tax" and therefore this discussion will be limited to that provision alone. Certainly (except for possibly Title II and Title III which deal with Agricultural Credits and Inflation and which were not parts of the original House bill) if the Process Tax is unconstitutional the remainder of the Farm Relief

1. Congressional Record, Vol. 77, pp. 1632-1635.

2. Congressional Record, Vol. 77, pp. 1703-1706.

3. Used in the sense that it was used by the Vice-President of the United States when Speaker of the House who said as regards certain estate tax legislation:

"The treasury estimates that there will be a refund of $25,000,000 to those who have died and had their estate taxed. What we hope in this resolution is to stop up this gap in the future. I hope in the next Congress a bill may be passed that will reach back and let the Supreme Court have one more guess." (Congressional Record, Vol. 74, No. 66, p. 7018.)

bill (Title I) necessarily falls. This is so despite Section 14 which provides for "Separability of Provisions" in case parts are declared unconstitutional. The Supreme Court has held that a separability clause will not save an entire law from being unconstitutional if the invalid part is the "axis" of the law. *Williams v. Standard Oil Co.*[4] Certainly, the Process Tax is the essential element of Title I of the law for the proceeds of this tax are the *sine qua non* of the other parts of the law. If the Process Tax is unconstitutional the rest of Title I necessarily fails for there would be no funds with which to carry out the relief provisions.

The Process Tax provision reads in part as follows:

"Sec. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. . . . The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. . . .

"(b) The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity; except that if the Secretary has reason to believe that the tax at such rate will cause such reduction in the quantity of the commodity or products thereof domestically consumed as to result in the accumulation of surplus stocks of the commodity or products thereof or in the depression of the farm price of the commodity, then he shall cause an appropriate investigation to be made and afford due notice and opportunity for hearing to interested parties. If thereupon the Secretary finds that such result will occur, then the processing tax shall be at such rate as will prevent such accumulation of surplus stocks and depression of the farm price of the commodity. In computing the current average farm price in the case of wheat, premiums paid producers for protein contents shall not be taken into account.

"(c) For the purposes of part 2 of this title, the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period specified in section 2; and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture."

Remembering that the Federal Government is a government by operation of delegated powers, it must first be ascertained whether or not the Federal Government can find support for the operation of this statute in the Constitution, for otherwise the Tenth Amendment would reserve the powers of this statute to the states or to the people. We must first then consider Section 8 of Article 1, Clause 1, which empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and to provide for the common Defense and general Welfare of the United States."

The most logical basis for support is, of course, the taxing power of the United States. We are, however, immediately confronted with the question of whether or not the so-called Process Tax is a tax. In *Loan Association v. Topeka*[5] the Supreme Court had to decide the question of whether a city could constitutionally issue bonds to be used by a private corporation in establishing a bridge works in the city. Accordingly, the interest on the bonds had to be met out of the tax revenues of the city, and in a suit to recover interest on the bonds the question of the constitutionality of the acts of the city was raised. The Supreme Court said that if the power to tax existed it was "the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of people . . ." But the Supreme Court went on to state that there were limitations on the power to tax, saying:

"This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised.

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

"Nor is it taxation. A 'tax,' says Webster's Dictionary, 'is a rate or sum or money assessed on the person or property of a citizen by government for the use of the nation or state.' 'Taxes are burdens or charges imposed by the legislature upon persons or property to raise money for public purposes.'"

The court then went on to define "public purpose" and held that a public purpose was not involved in that proceeding. The court said that what was or was not a public purpose was not an easy line to draw and in the course of its opinion intimated that public utilities, such as railroads which had been devoted to a public use, might be considered as a public purpose.[6]

The above adjudication naturally impels us to consider whether or not the present law taxes the public for a public purpose, i.e., whether the rental of lands and the distribution of benefits to the farmers under the present emergency situation can be considered as a public purpose. To say that it is not a tax until one can first decide the nature of relief given to the farmers, would seem to beg the question.

The issue of devoting public funds to private enterprises arose in the *Sugar Bounty Cases*.[7] The Supreme Court avoided the question of the constitutionality of the Sugar Bounty law by invoking the debt provision of Section 8, Article 1, of the Constitution and saying that inasmuch as the Sugar Bounty law created a moral obligation upon the United States under the facts of the case, therefore the United States was in a position to pass a law providing for an appropriation to pay this moral obligation even though the law creating the obligation might have been unconstitutional.

It is possible to argue from the *ratio decidendi* of this case that since the obligation of the United States (whether moral or legal) to the farmer is incurred prior to the collection of the tax from the processor, the tax may be collected as a tax to pay the debts of the Federal Government. But it is believed that such an argument, depending as it does upon the brief lapse of time existing between the sale of the goods by the farmer to the processor and the collection of the tax from the latter person, would be looking at the surface only and disregarding the substance which is an attempt to tax A for the benefit of B. It is certainly difficult to say that the purpose for which this tax is raised can be designated as a public one. As the Supreme Court said in *Loan Association* case, *supra:*

"And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what

4. 278 U. S. 235.
5. 20 Wall. 655.
6. Cf. *Cole v. La Grange*, 113 U. S. 1, which is limited by the decision to the application of the state constitution involved.
7. *United States v. Realty Co., United States v. Gay*, 163 U. S. 427.

objects or purposes have been considered necessary to the support and for the proper use of the government, whether State or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

Obviously, this tax cannot be justified as being for a public purpose upon the ground of past practice. However, the following proposition is suggested which might be a basis for holding the tax constitutional. In *Wilson v. New*,[8] the Supreme Court upheld the Adamson law which fixed the hours of labor and a temporary wage scale between the railroad employer and employee. The law was passed as emergency legislation in order to prevent the shutting down of our railroads at a time when this country was on the verge of entering the World War. Again in *Block v. Hirsh*[9] and *Marcus Brown Holding Co. v. Feldman, et al*,[10] the Supreme Court passed upon emergency legislation involving the rent laws of Washington and New York which had been passed during the war period in order to prevent the eviction of tenants due to the great increase of people residing in the District of Columbia and New York and the consequent effect of the economic law of supply and demand. In *Wilson v. New* and *Block v. Hirsh*, the Supreme Court made two statements which would seem to have profound effect upon the question here involved. In the former the court said:

"The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed."

In the latter the court said:

"Plainly circumstances may so change in time or so differ in space as to clothe with such an interest [public] what at other times or in other places would be a matter of purely private concern."

In speaking of these cases in *Adkins et al v. Childrens Hospital*,[11] wherein the Supreme Court held unconstitutional a minimum wage law for the women of the District of Columbia, the Supreme Court said:

"Moreover, in sustaining the wage feature, of the law, emphasis was put upon the fact (p. 345) that it was in this respect temporary 'leaving the employers and employees free as to the subject of wages to govern their relations by their own agreements after the specified time.' The act was not only temporary in this respect, but it was passed to meet a sudden and great emergency. This feature of the law was sustained principally because the parties, for the time being, could not or would not agree. Here they are forbidden to agree.

"The same principle was applied in the *Rent Cases (Block v. Hirsh*, 256 U. S. 135, and *Marcus Brown Holding Co. v. Feldman*, 256 U. S. 170), where this Court sustained the legislative power to fix rents as between landlord and tenant upon the ground that the operation of the statutes was temporary to tide over an emergency and that the circumstances were such as to clothe 'the letting of buildings . . . with a public interest so great as to justify regulation by law.' The Court said (p. 157):

"'The regulation is put and justified only as a temporary measure [citing *Wilson v. New, supra*]. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.'"[12]

It might be said accordingly, that the relief of the farmers, in the present national emergency, for a temporary period creates such a public interest in that work as to justify the imposition of a tax the proceeds of which are to be devoted to such public purpose.

Admittedly such a proposition is far reaching in its effect and in view of the fact that both *Wilson v. New* and the *Rent Cases* were 5 to 4 decisions of the Supreme Court it is impossible to hazard even a surmise as to what the present make-up of the court would hold. Only three of the judges who considered *Block v. Hirsh* are still on the bench and it should be noted that two of these three were on the dissenting side in that case.[13] It must also be admitted that the above theory of sustaining the constitutionality of the act opposes the *ratio decidendi* of many previous Supreme Court decisions.

It is believed that the Supreme Court might logically hold that the Process Tax involved in this law is an attempt at price fixing under the guise of taxation and as such it interferes with the reserved power of the states.[14] In this connection attention is called to the fact that the preamble of the law provides:

"To relieve the existing national economic emergency by increasing agricultural purchasing power."

Section 2 of Title I, which is the declaration of policy contained in the act, states that the policy of Congress in enacting the legislation is to maintain prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy. And finally the report of the Senate Committee on Agriculture and Forestry provides:

"Both title 2 [containing the Process Tax provisions] and title 3 attempt to lay down a principle by which the price of farm products may be raised."

Certainly then it may be said with good reason that the purpose of the law is to fix prices and with that in mind we must approach the *Child Labor* and *Oleomargarine Cases*.

In *Hammer v. Dagenhart*,[15] the statute under consideration prohibited the shipping of goods in interstate commerce within a certain specified time from the date

8. 243 U. S. 332.
9. 256 U. S. 135.
10. 256 U. S. 170. See also *Levy Leasing Co. v. Siegel*, 258 U. S. 242; *Chastleton Corp. v. Sinclair*, 264 U. S. 543.
11. 261 U. S. 525.
12. Attention is called to the strained construction employed by the Supreme Court in the *Wilson v. New* and *Rent Cases, supra*. The following language is used in *Wilson v. New*:

"The proposition begs the question, since although an emergency may not call into life a power which has never lived, neverthless emergency may afford a reason for the exertion of a living power already enjoyed."

This doctrine of natural law is far removed from the eloquent language of Mr. Justice Davis in *Ex parte Milligan*, 4 Wall. 2 at 120,

121. This latter case arose under the exigencies of the Civil War yet the Supreme Court through Mr. Justice Davis said:

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attemped in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority."

13. Cf. *Tyson & Brother v. Banton*, 273 U. S. 418, where a price fixing statute of New York State was held unconstitutional by a 5 to 4 vote. Four of the judges who voted the statute unconstitutional are still on the bench whereas only two of the dissenters are still members of the court. The majority opinion in this case has statements in it which could be used by either side on this question. Thus they justify the *Wilson* v. *New* and *Rent Cases* on the ground that they are emergency legislation but in the next sentence state:

"Nor is the sale of ordinary commodities of trade affected with a public interest so as to justify legislative price fixing."

Query: Does this last sentence limit the preceding sentence about emergency legislation or work under the rule of emergency legislation?

14. It is to be noted that the cases dealing with the constitutionality of price fixing involved state statutes and the use of the police power. Of course there is excepted from this statement such cases as *Wilson v. New*, etc., which involve the commerce power of Congress, and three of the *Rent Cases* which involve the legislative power of Congress over the District of Columbia—but these powers are not involved in this case. It would seem that Congress by this present act is interfering with a power reserved to the states. Cf. the case of *Sterling v. Constantin*, — U. S. —, 52 Sup. Ct. 190 (Dec. 19, 1932) on the right of a State to regulate unnecessary loss and waste of oil, with *Wolff Co. v. Industrial Court*, 262 U. S. 522, involving wage fixing by a State in non-essential industries.

15. 247 U. S. 251.

of their production if such goods were produced by child labor. The court said:

"The act in its effect does not regulate transportation among the States, but aims to standardize the ages at which children may be employed in mining and manufacturing within the States. . . . When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power. . . . The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. [citation]

"Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. . . . If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the States, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States. . . .

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture."

The principles of the above mentioned case which dealt with the commerce power of the Federal Government were equally applied in *Bailey v. Drexel Furniture Co.*,[16] in which the taxing power was involved. In that case the Federal Government, in its attempt to protect child labor, provided for a tax of ten per cent of the entire net profits of a corporation for any given year in which child labor was employed contrary to the provisions of the law. Realizing perhaps that the distinction between taxation and regulation is much harder to define than the distinction between commerce and regulation, the language used by the Supreme Court in the *Bailey* case is not as forceful as in the *Hammer* case, but nevertheless the Supreme Court reached the same conclusion with only one dissenting vote as compared to the four dissenting votes in the *Hammer* case, and held that:

"Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

In *Hill v. Wallace*[17] the constitutionality of Future Trading Act of Congress was attacked. This statute imposed a tax on contracts for the sale of grain for future delivery but excepted certain boards of trade which were to be designated by the Secretary of Agriculture. The Supreme Court held the tax sections of the act unconstitutional on the ground that it was regulation rather than taxation and therefore was controlled by the *Bailey* case, *supra*.

One cannot escape the conclusion that, if the logic of this decision were applied, the present law would be held an attempt at price fixing under the guise of taxation, and, as such, an interference with the reserved powers of the states. And it cannot be justified on the ground that it is an exercise of the commerce power of the Constitution for the reason that the Process Tax provisions of the act apply equally whether the goods to be processed are to be shipped in interstate commerce or are grown, processed, sold and consumed entirely within the confines of one state.

On the other side of the question of abuse of taxing power by the Federal Government, we have the case of *McCray v. United States*, 195 U. S. 27, which dealt with an excise tax on oleomargarine. In that case the court said:

"It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive."

It would seem, therefore, that the present law falls more clearly within the decision of *Hill v. Wallace, supra*, than it does within the decision of the *McCray* case, for, as was similarly said in *Hill v. Wallace*, it is impossible to escape the conviction, from a full reading of the law, that it was enacted for the purpose of regulating the prices of farm commodities rather than to raise revenue. It is also apparent that the *Hill* and *McCray* cases cannot be logically reconciled. The *Child Labor Cases* imposed a tax upon the violation of a given regulation, but both *Hill v. Wallace* and *McCray v. United States*, imposed a tax not upon the violation of a regulation but upon the sale of specific articles.

Nevertheless, in the light of the national emergency existing as to farm relief, it is possible and probable that the Supreme Court may follow the *Oleomargarine Case* and hold the tax constitutional.

Before reaching any conclusion, however, it should be pointed out that for Senator Reed's other grounds holding the Process Tax unconstitutional there does not seem to be substantial ground. His first three grounds are discussed above. His fourth ground is that the law is unconstitutional because it delegates the legislative taxing power to a member of the executive branch of the government. However, since the Flexible Tariff cases, *Field v. Clark*,[18] *Hampton v. United States*,[19] and *United States v. Grimaud*,[20] dealing with the Forest Reserve, there is not much likelihood of this law being held unconstitutional for the reason above mentioned. It cannot be said that Congress in this present law has failed to indicate a "purpose" (Title I, Section 2) nor can it be doubted that Congress has legislated on the matter as far as is "reasonably practical" considering the experimental nature of the bill.

The Pennsylvania Senator's fifth argument is based on the "equal protection of the laws" clause of the Constitution. However, if Congress has the power to levy this tax under its taxing powers, the *Oleomargarine Case* would seem to be a complete answer to this objection, for Congress may classify the subjects of taxation and discriminate between classes without violating the equal protection clause. And it is evident from reading the *Oleomargarine Case* that it takes an exceedingly small difference to justify a congressional distinction.

The sixth argument of Senator Reed is based upon the "export" clause of the Constitution. In the case of *Dooley v. United States*[21] it is clearly established that the prohibition against placing a tax on exports from a state relates solely to exports to a foreign country and has no bearing on the shipment of goods from one state to another.

In conclusion it must be said that if the Supreme Court should look through form to substance it is be-

16. 259 U. S. 20.
17. 259 U. S. 44.
18. 143 U. S. 644.
19. 276 U. S. 394.
20. 220 U. S. 506.
21. 183 U. S. 151.

lieved that it can hardly avoid recognizing that the Process Tax is a price fixing arrangement. Attempts by the states to fix or regulate prices of commodities in the past have been held unconstitutional as a violation of the Fourteenth Amendment. Thus in *Williams v. Standard Oil Co.*[22] there was involved a Tennessee statute fixing the price on gasoline. The court held that gasoline was not affected with the public interest and that therefore "the state legislature was without constitutional power to fix prices at which commodities may be sold, services rendered, or property used." In *Fairmont Creamery Co. v. Minnesota*[23] the court considered a state statute requiring the buyer of milk to pay a uniform price therefor. The court said:

"Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse."

Inasmuch as the Supreme Court has held that the Fifth Amendment restricts the United States in the same manner that the Fourteenth Amendment restricts the states,[24] it is believed that the process tax should, under existing precedent, be declared unconstitutional.[25] However, the present economic emergency will be an impelling force that probably will "liberalize" the Court sufficiently to declare the law constitutional.[26] Much depends on the state of the depression at the time a test case reaches the Supreme Court.

22. 275 U. S. 235.
23. 274 U. S. 1.
24. *Heiner v. Donnan*, 285 U. S. 312.
25. The argument against constitutionality is ably summed up in two recent Supreme Court decisions. In *Adkins, et al v. Childrens Hospital, supra*, the court said:

"In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission power to determine the quantity of food necesary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test."

And in *New State Ice Co. v. Liebmann*, 285 U. S. 262, which involved an Oklahoma statute requiring manufacturers of ice to procure licenses, the court recently said:

"Here we are dealing with an ordinary business, not with a paramount industry, upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. . . . And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use. . . .

"And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the Federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. This principle has been applied by this court in many cases."

But the converse of the above argument is equally well epitomized by Mr. Justice Brandeis in his dissenting opinion in the *New State Ice Company* case:

"But the business of supplying to others, for compensation, any article or service whatsoever may become a matter of public concern. . . .

"There must be power in the states and the nation to remould, through experimentation, our economic practices and the institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the states which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts."

26. One of America's leading professors of law recently said:

"The Constitution today is a document which permits the spirit of the times to stalk unrestrained."

AN IMPORTANT JUDGMENT OF THE WORLD COURT

Claims by Denmark and Norway to Eastern Greenland—Former's Contention Upheld, Thus Ending Long-Standing Dispute between the Two Nations—Norway Promptly Accepted Decision and Revoked Its Declarations of Occupation—The Facts Presented and Importance of the Judgment

By Manley O. Hudson
Bemis Professor of International Law, Harvard Law School

On April 5, 1933, the World Court gave an important judgment upholding Denmark's claim to certain territory in Eastern Greenland.[1] The judgment marks the close of a long-standing dispute between Denmark and Norway, and Norway's prompt acceptance of it is a fresh reminder of the gain which the world has made in international organization since the War. This was the first judgment to be given in exercise of the Court's compulsory jurisdiction under the so-called "optional clause," and the case may be viewed as a test of the value of such jurisdiction.

The Dispute Before the Court

On July 10, 1931, the Norwegian Government proclaimed the occupation of certain territory in Eastern Greenland. This territory had been regarded by Norway as *terra nullius*, though it was regarded by Denmark as Danish territory. Both Denmark and Norway being parties to the "optional clause" attached to the Statute of the Court, the dispute was not allowed to smoulder until public opinion became inflamed. On July 12, 1931, the Danish Government made application to the Court, praying for judgment that the Norwegian proclamation constituted a "violation of the existing legal situation" and was consequently "illegal and null and void." Norway did not contest the jurisdiction, and both Governments proceeded to appoint agents to conduct the case. Time-limits were set for the filing of a case, a counter-case, a reply and a rejoinder; the written proceedings were completed

1. Publications of the Court, Series A/B, No. 53.

and the matter became ready for hearing on October 14, 1932.

On August 19, 1931, the Government of Iceland informed the Court that in its opinion Iceland had an interest of a legal nature which might be affected by the decision of the case; but it did not ask to be permitted to intervene.

On July 12, 1932, the Norwegian Government proclaimed the occupation of additional territory in Southeastern Greenland, following the receipt of information that the Danish Government had invested the leader of a Danish expedition in that territory with police powers to be exercised over Norwegian as well as Danish nationals. On July 18, 1932, Denmark and Norway each filed an application with the Court, the former asking that this second proclamation as to Southeastern Greenland be declared to be "illegal and null and void," and the latter asking that it be declared to be "legally valid." The Norwegian Government also asked the Court to order "forthwith," as "an interim measure of protection," that the Danish Government "abstain from any coercive measure directed against Norwegian nationals in the said territory." As a request for interim protection is always given priority over other pending matters, arguments were heard with reference to it on July 28, 1932, and on August 3, 1932, the Court issued an order dismissing the request but reserving the power to indicate measures of interim protection *proprio motu*. On August 2, 1932, the Court issued an order joining the two suits as to Southeastern Greenland brought by Denmark and Norway, respectively, since they were "directed to the same object"; but it did not join the suits as to Southeastern Greenland with that as to Eastern Greenland.

On November 21, 1932, when the Court met to hear arguments in the original case brought by Denmark, it included judges *ad hoc* appointed by Denmark and Norway, respectively. Forty-eight public sittings were devoted to the hearings of agents and counsel, which continued from November 21, 1932 to February 7, 1933. Literally hundreds of documents, including numerous maps, were filed by each of the parties; though it was confronted with a very voluminous record, the Court's judgment was handed down within two months after the conclusion of the oral proceedings.

The Facts Presented

Greenland was discovered about a thousand years ago, but it was only in the latter part of the nineteenth century that it was known to be an island, the fact having been established by Admiral Peary. Two early settlements in Western Greenland, existing for a time as independent, became tributary to Norway in the thirteenth century, but disappeared before 1500. While Norway and Denmark were united under the same Crown, from 1380 to 1814, contacts with Greenland were not entirely lost, and in the eighteenth century some settlements were established in Western Greenland. In 1814, when Norway was united to Sweden, no cession of Greenland was made by the King of Denmark. In 1894, a Danish settlement was established on the Eastern coast. Various concessions in Greenland granted by Denmark in the late nineteenth and early twentieth century led to no practical result. When a Norwegian expedition established a wireless station on the Eastern coast, in 1922, protest was made by Denmark, though the station has functioned since and continues to function under a Norwegian company.

Between 1915 and 1921, overtures were made to various Governments by Denmark, with a view to securing a recognition of Danish sovereignty over the whole of Greenland. On August 4, 1916, when Denmark ceded the Virgin Islands to the United States, a declaration was made by the Secretary of State of the United States to the effect that no objection would be made to Denmark's extending its political and economic interests to the whole of Greenland. The question was raised with Norway in 1919 in connection with the Spitzbergen negotiations, and on July 22, 1919, M. Ihlen, the Norwegian Minister for Foreign Affairs, told the Danish Minister at Christiana orally "that the Norwegian Government would not make any difficulties in the settlement of this question." In 1920, assurances were given to Denmark by the British, French, Italian and Japanese Governments; and the Danish Government felt itself fortified to approach the Swedish and Norwegian Governments for definite action. The Swedish Government raised no difficulty, but Norway declined to give the assurances desired. In reliance on M. Ihlen's verbal assurance of 1919, however, the Danish Government proceeded in 1921 to proclaim that the whole of Greenland was henceforth linked up with Danish colonies and stations under the authority of the Danish Administration of Greenland. This was followed by negotiations between Denmark and Norway which led to the signing of a convention on July 10, 1924, but the question of the sovereignty of Eastern Greenland was not solved by this convention. In 1930 Denmark adopted a "three-year plan" for scientific research in Eastern Greenland, with reference to which the Norwegian Government made reservations. It was the conferring of police powers on this expedition which made the question of sovereignty acute in 1931, and the two Governments were then unable to avoid dealing with it. After a vain effort to draw up a special agreement for referring it to the World Court, the Norwegian Government issued its proclamation of July 10, 1931.

The Law of the Case

The Danish claim to sovereignty over the whole of Greenland was based, in part, upon the claim and exercise of sovereign rights over a long period of time. It was the easier for Danish sovereignty to be established because "up to 1931 there was no claim by any Power other than Denmark to the sovereignty over Greenland," and up to 1921, the Court finds, no Power had disputed the Danish claim to sovereignty. The Court refers to "the Arctic and inaccessible character of the uncolonized parts of the country," and in view of the Danish legislation of the eighteenth century, it concludes that from 1721 up to 1814, the King of Denmark and Norway displayed "his authority to an extent sufficient to give his country a valid claim to sovereignty." However, the rights which the King possessed over Greenland were enjoyed by him during this period as King of Norway. As a result of the Treaty of Kiel of 1814, "what had been a Norwegian possession remained with the King of Denmark and became for the future a Danish possession." Thereafter, Denmark made various treaties which excluded Greenland from their op-

eration, and these demonstrate "Denmark's will and intention to exercise sovereignty" in this later period. The Court concludes therefore that from 1814 to 1915 Denmark must be regarded as having displayed "her authority over the uncolonized part of the country to a degree sufficient to secure a valid title to the sovereignty."

The attitude taken by various governments toward the Danish overtures between 1915 and 1921 is also indicative of Denmark's desire to have her sovereignty recognized. Though at times Denmark had negotiated for the "extension" of her sovereignty, there is no ground for holding this an admission that no sovereignty was posssessed over the uncolonized part of Greenland. The Court reaches the conclusion that from 1921 to 1931 Denmark, regarding herself as possessing sovereignty over all Greenland, displayed and exercised sovereign rights to an extent sufficient to constitute a valid right to sovereignty. It follows that on July 10, 1931, Denmark "possessed a valid title to the sovereignty over all Greenland," and that the Norwegian proclamation of 1931 was illegal and invalid.

The Danish Government also contended that Norway had given undertakings which recognized Danish sovereignty over all Greenland. In the period from 1814 to 1819, "Norway undertook not to dispute Danish sovereignty over Greenland"; the undertaking culminated in Article 9 of the Convention of September 1, 1819. More recent treaties and conventions between the two Governments, also, seem to be based on a Norwegian recognition of Greenland as Danish. As to the verbal assurance given by M. Ihlen on July 22, 1919, the Court could not uphold the Danish contention that this was a recognition of an existing Danish sovereignty in Greenland; while this assurance by the Norwegian Minister for Foreign Affairs was binding on his country, being "unconditional and definitive," M. Ihlen did not intend it to be a definitive recognition of Danish sovereignty. The Ihlen declaration was merely "an engagement which bound Norway" to refrain from contesting Danish sovereignty over Greenland as a whole and *a fortiori* to refrain from occupying a part of Greenland.

The Court's judgment, reached by twelve votes to two, was "that the declaration of occupation promulgated by the Norwegian Government on July 10, 1931, and any steps taken in this respect by that Government, constitute a violation of the existing legal situation and are accordingly unlawful and invalid." Each party had asked the Court to order the other to pay costs, but the Court refrained from making any order as to costs.

In separate observations, Judge Schucking and Judge Wang expressed the opinion that Denmark did not have sovereignty prior to the overtures of 1915-1921, but they agreed with the majority of the Court that the Norwegian occupation is unlawful and invalid. Judge Anzilotti and M. Vogt, who sat as Judge *ad hoc* for Norway, dissented. Judge Anzilotti thought that the overtures made by Denmark from 1915 to 1921 showed conclusively that Denmark was raising merely a question of *extending* her sovereignty. With reference to the declaration by the Norwegian Minister for Foreign Affairs in 1919, Judge Anzilotti found that an agreement was concluded between the two Governments "by means of purely verbal declarations" and that "declarations of this kind are binding upon the State." Though this agreement was made with a view to settlement of the Greenland question by the Peace Conference, the fact that Denmark was not permitted to raise the question at the Peace Conference did not invalidate the agreement. Judge Anzilotti concluded that the Norwegian occupation in 1931 was effected in violation of an undertaking validly assumed and was therefore unlawful. M. Vogt stressed the legal consequences of the overtures made by Denmark between 1915 and 1921, and concluded that they contained an admission by Denmark that sovereignty was not theretofore possessed over all Greenland. He concluded that while Denmark had the *animus possedendi* she did not have the *corpus possessionis* for the period since 1921. He regarded the Ihlen declaration as made under a fundamental and excusable misapprehension, and thought that its effect was entirely obliterated by the rupture of the negotiations between Denmark and Norway.

Reception of the Judgment

The judgment of the Court was received with great public rejoicing in Denmark, and with corresponding disappointment in Norway. The Government of Norway promptly announced its intention to abide by the judgment, however, and it proceeded to revoke the declarations of occupation of July 10, 1931, and July 12, 1932. On April 18, 1933, the Norwegian Agent joined with the Danish Agent in informing the Court that the two Governments desired to discontinue the proceedings instituted before the Court on July 18, 1932, with reference to Southeastern Greenland. The decision as to Eastern Greenland had indicated that Norway could entertain no hope of winning the case as to Southeastern Greenland.

Importance of the Judgment

The dispute in this case dealt with issues of economic importance to Denmark and Norway. Fishing, hunting, and colonizing rights were involved, which for each of them were considered to have value. In fact, it was precisely the kind of dispute which only a few years ago most States of the world were unwilling to agree to arbitrate, because "national honor and vital interests" were involved. With the establishment of the World Court, however, there has been a big advance in our law of pacific settlement. Not only have arbitration treaties become more inclusive. Forty-two States are now bound by the "optional clause" of the Statute of the World Court, under which they have given the Court a compulsory jurisdiction to deal with certain classes of legal disputes. The old exception of disputes concerning matters affecting national honor and vital interests has disappeared; new exceptions have appeared, such as that concerning domestic questions, but their scope is less far-reaching. If the progress which has been made can be maintained, a new attitude may come to prevail toward the pacific settlement of disputes. The action of Denmark and Norway is a clear milestone on that road, and in this instance the World Court has lived up to the high hopes entertained for its usefulness.

INTERSTITIAL LEGISLATION BY U. S. SUPREME COURT

(Continued from page 382)

to say that "the interstate commerce clause did not withdraw from the States the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it." The opinion leaves much to be desired from the standpoint of rational exposition or exegesis of the real problem involved and the harmful effects that would have accrued had the decision been otherwise. The Court always has the last word on what is a "burden" on interstate commerce on the part of one of the component States, or, as has already been seen, when individuals act singly or in concert and their acts "directly" and "substantially" affect interstate commerce in some fashion. In other words, as Mr. Justice Stone has pointed out in another connection,[46] the test "direct burden on interstate commerce" is not a formula for reaching a given result, or is not a re-agent for solving certain problems, but is rather a result reached after some other antecedent process has been employed. The truth of the matter is that a "direct" burden on interstate commerce is what a majority of the Supreme Court justices agree to be such a burden,[47] as Mr. Justice Holmes has similarly expressed it in reference to decisions by the Court concerning the meaning of "due process" and other uncharted formulae of the Federal Constitution.[48] However this may be, the real point is that the Federal Supreme Court has thrown its weight in favor of the operation of State compensation laws in the field of interstate rail employments, but only when rail work injuries and deaths are occasioned by intrastate acts unconnected at the same time with interstate acts.

The interstitial character of the judicial legislation by the Court within this field of the application of State compensation laws to the vast gap left by the Federal Employers' Liability Act should be emphasized in this connection. The effect of it is to give federal consent to the operation of State compensation acts within the circle of interstate rail callings where the Federal Liability Act cannot operate, at least until Congress decides that such State operation is a burden on interstate commerce, or that Congress has taken to itself regulation of this phase of the subject-matter.[49] On the other hand, it would seem to be unconstitutional within the meaning of the *First Employers' Liability Cases,* for Congress to attempt to legislate within the intrastate field of the interstate railroad, unless the Supreme Court will overrule itself in this respect. A changed judicial personnel on the Court is a weighty argument that the Court will look at this problem from another viewpoint in the future should federal legislation eventuate in the form of a compensation law for all interstate employés, and not merely for rail employés, whether engaged in interstate or intrastate commerce. Until Congress attempts this, then, the Supreme Court has solved the problem, temporarily at least, by allowing State compensation laws to extend into the field of intrastate acts of interstate rail employés. That this is sound, in that it further opens the field of compensatory relief to rail workers where the Federal Employers' Liability Act is not exclusive, cannot be denied. But that it is interstitial legislation would seem equally to follow.

Insulating the Federal Employers' Liability Act Against State Interference

The Supreme Court has succeeded in precluding application of State statutes within the field of operation of the Federal Employers' Liability Act, and has done so by piecemeal legislation as cases and controversies have arisen presenting these issues. The Congress, in drafting the Act, either took much for granted or purposely legislated only in general terms, thus impliedly authorizing the Court to build the Act into a workable corpus juris. For example, the Act predicates liability of the interstate rail employer only for negligence, but there is no statutory definition of negligence attempted. Practically, it is probably wise policy not to attempt definition because of the innumerable variations in facts and circumstances out of which negligence may arise; it is a standard of conduct, not an inflexible rule of action. But if negligence is to rest upon fact, and if suits under the Federal Liability Act may be brought at the option of the injured or deceased rail worker in either a Federal or State court, what if the State attempts by statute to draw inferences that certain events shall be presumed to be negligence generally throughout the State? Shall these statutes have operation also in suits brought under the Federal Act? Does absence of federal definition negate State attempts at definition? If a State court of competent jurisdiction, hearing a cause of action under the Federal Act may make findings of fact, why may not equally a State legislature? In *Chesapeake & Ohio Ry. Co. v. Stapleton,*[50] decided in 1930, the question was presented, how far the employment by an interstate rail carrier in Kentucky, of a worker under the age of sixteen years was, by reason of its violation of the State statute, a negligent act, so as to justify suit under the Federal Employers' Liability Act? No other proof of negligence as fact was offered to sustain the action. The holding of the Court, reversing the State court, was that the State statute had no operative effect within the field of the Federal Act, in that that Act was exclusive in defining the rights and duties of interstate rail employers and their employés where the latter were subject to the Act. The Court emphatically stated that the kind or amount of evidence required to establish negligence was not subject to the control of the

46. Dissenting in Di Santo v. Pennsylvania (1927), 273 U. S. 34, 47 Sup. Ct. 267, 71 L. Ed. 524.
47. Cf. "What is a Direct Burden on Interstate Commerce?" 22 Ill. Law Rev. 197.
48. Dissenting in Baldwin v. Missouri (1930), 281 U. S. 586, 50 Sup. Ct. 436, 74 L. Ed. 1056.
49. Cf. "Congression[al] Assent to State Taxation Otherwise Unconstitutional," 17 Amer. Bar Ass'n Journ. 821.
50. (1930) 279 U. S. 587, 49 Sup. Ct. 442, 73 L. Ed. 861.

several States.[51] In reaching this result, the Court built upon several State decisions in other jurisdictions, as well as dicta in its own prior decisions, and actual holdings that State statutes relating to assumption of risk were inapplicable to suits under the Act, nor State statutes drawing *prima facie* presumptions of negligence from the happenings of other events. The Court distinguished situations where State statutes were given effect by the Court in the field of rail employers' liability because imposing duties upon all rail employés, whether interstate or intrastate, to safeguard the public in the operation of trains. For example, a State statute requiring an engineer to stop his locomotive at a certain distance from a crossing of another railroad to ascertain whether the way was clear before proceeding, imposed a personal duty upon the engineer as a safety measure to the public, and did not enlarge or contract the Federal Employers' Liability Act, so that failure of the engineer to observe the statutory duty, resulting in his death, debarred recovery by his administratrix in a suit under the Act.[52] Such reasoning and distinctions which are not based upon analytical differences, smack of legislation motivated by the desire to keep the Federal Act as far as possible free from numerous types of State restrictions, but at the same time to be more flexible in the case of State laws that the Court regards as not too serious invasions. The Court, as a tribunal continually in session, thus performs the important function of adapting the Act to new and unforeseen situations requiring flexibility and concrete treatment. The Act would be plastered with many legislative amendments were Congress to act each time its attention were called to certain gaps in the Act. And this is assuming that Congress, a cumbersome body, would act at all. The Court, probably better informed by sound reasoning and authoritative data of counsel, with calm and dispassionate reflection by the bench of justices, thus performs a commendable function in administration of the Act. Whether self-evident consistency of decision, measured by analytical distinctions, always results, is, however, dubious.

Exploring this topic further, it may also be noted that the Federal Liability Act leaves much to be desired in precision of meaning of the terms "next of kin," "personal representative," "survivors," "children," and "dependents." The assumption might be drawn that definition or clarification of these terms could not be affected by State law, no more than the meaning of "negligence" could be. But here the Court has decided that since there is no federal legislation by way of definition of these terms, State law will be allowed to operate. In *Seaboard Air Line Ry. Co. v. Kenney,*[53] decided in 1916, the question at issue was whether the State law of North Carolina should be given application under the Federal Employers' Liability Act with reference to determining who were the "next of kin" of a deceased rail employé, in order to maintain an action under the Act. Mr. Chief Justice White, speaking for the Court said:

> "As, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various States to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the Act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the State law."[54]

As there was no showing in this case that the State law enlarged or restricted the Federal Liability Act in any fashion, but the question being only to determine who among conflicting claimants were entitled to the action admittedly available under the Act, the Court properly sustained the State law. So also the Court has sustained a State law to operate in actions under the Federal Liability Act which permitted juries to return less than a unanimous verdict.[55] But a very different situation arises where the effect of a State law would be to create a cause of action under the Act which the latter does not permit. For example, the Act contemplates that if a deceased rail employé leaves no survivors, no action shall lie. Thus, if a State law which rests on the conception of damages for death by wrongful act recoverable for the decedent's estate although no survivors were to be allowed operative effect in actions under the Federal Liability Act, there would be an unconstitutional and unwarranted invasion by the State into the field of federal control.[56] It is on the same theory, also, that the Court, as already indicated, reacted unfavorably to State laws seeking to define "negligence," for if the several States were permitted this power they might gradually so extend the meaning of "negligence" as to make it synonymous with absolute liability, thus defeating the intent of Congress which has predicated the Liability Act upon negligence provable as fact.[57]

Further legislation is probably unnecessary on the part of Congress with respect to prohibition of State law within the field of the Federal Liability Act, but much labor and litigation, with resultant uncertainty, would have been avoided had Congress drafted a more perfect piece of workmanship. The Supreme Court has, however, done much of this for the Congress, and made the Act work pragmatically, which, but for the Court's action, would not have been possible. The Court has kept uniformity of federal control where it has felt this to be necessary, but allowed variation in the several States, due to their varying statutes, where these did not mar the uniformity of the Act. In the process, of course, interstitial legislative activity was inevitable.

Resumé and Conclusions

The moral of this discussion must now be briefly stated. The manner in which the Supreme Court has covered the Federal Employers' Liability Act with a labyrinth of decisions, resulting in judicial legislation and the creation of a new Act in

51. Recently the Court has held void as violative of "due process" of law, State laws indulging in presumptions of negligence. Ct. Manley v. State of Georgia (1929), 279 U. S. 1, 49 Sup. Ct. 215, 73 L. Ed. 575; and Western A. R. R. Co. v. Henderson (1929), 279 U. S. 639, 49 Sup. Ct. 445, 73 L. Ed. 884. These cases are noted by me in "Validity of State Statutes Creating Presumptions of Negligence as Due Process of Law," 24 Ill. Law Rev. 689.

52. (1923) Frese v. Chicago, B. & Q. Ry. Co., 263 U. S. 1, 44 Sup. Ct. 1, 68 L. Ed. 131.

53. (1916) 240 U. S. 489, 36 Sup. Ct. 458, 60 L. Ed. 762. And cf. Lytle v. Southern Ry. (1929), 149 S. E. 692.

54. Supra, note 52, pp. 493, 494.

55. (1916) Chesapeake & Ohio Ry. v. Kelly, 241 U. S. 485, 36 Sup. Ct. 630, 60 L. Ed. 1117; Minn. & St. Louis Ry. v. Bombolis, 241 U. S. 211.

56. (1930) Lindgren v. United States, 281 U. S. 38, 50 Sup. Ct. 207, 74 L. Ed. 686. This case arose under the Merchant Marine Act of 1920, which extended the provisions of the Federal Employers' Liability Act relating to interstate railroads to "any seaman."

57. Cf. my note, "Is Violation of a State Statute Defining Negligence Applicable to the Federal Employers' Liability Act?" 24 Ill. L. Rev. 580.

several important features, might be further illustrated, did space permit, by its holdings relating to death actions under the Act;[58] by its construction of the defense of "assumption of risk;" virtually restoring the fellow-servant rule in certain of its aspects;[59] its treatment of State laws relating to safety devices on railroads subject to the Federal Safety Appliance Act,[60] and other more or less important phases of the Act.[61] Enough data, however, have been furnished, it is believed, to sustain the thesis advanced, that the heart of the Federal Employers' Liability Act has been substantially modified by the Court's decisions relating to "burdens" on interstate commerce caused by rights of action, the interpolation of "transportation" for "commerce," and the intermingling of State compensation laws with federal liability provisions. The product thus resulting is a codex of industrial injury schemes, partly statutory, but largely judicial decision, that is in some respects uncertain, although in others more precise, if not in complete harmony with the congressional intent as expressed in the Act itself. The lesson or moral of the whole discussion is that new legislative premises are necessary to clear away much of this overgrowth of uncertainty; to accept, but with more clarified statement, that which points to the widening of the employment of workmen's compensation, and thus to build anew a better machinery for adjusting claims for rail work injuries and deaths occasioned by the business of interstate rail transport in the United States.

58. (1928) Mellon v. Goodyear, 277 U. S. 335, 48 Sup. Ct. 541, 72 L. Ed. 906; (1930) B. & O. Ry. v. Carroll, 280 U. S. 491, 50 Sup. Ct. 182, 74 L. Ed. 566.

59. G. A. Smith, "The Federal Employers' Liability Act," 12 Amer. Bar Ass'n Journ., 486, 721, 784, 855; and my note, "Assumption of Risk Under the Federal Employers' Liability Act," 20 Ill. L. Rev. 83.

60. Cf. My discussion, "State Attempts to Regulate Safety Appliances of Railways," 21 Ill. L. Rev. 83.

61. I have reserved for another discussion how far the Act is vitally defective and should be repealed. In the instant discussion, I am primarily interested in the way in which the Supreme Court has modified the Act through judicial legislation.

South American Current Practices

III. PERU.

BY GORDON IRELAND*

PERU, third in size of the South American Republics, finds herself at the moment in a state of essentially unsettled or transitional government that makes permanent or long term conclusions as to her laws of doubtful value. A Constitutional Convention, which met first in 1931, is still acting as the legislative body for the country, functioning more easily for reforms as a unicameral body than would the bicameral Congress called for by the new Constitution, which has been completed and approved, but not yet promulgated, and which it is impossible to procure in official form. The President, duly elected for a four year term, was inaugurated Dec. 8, 1931, and the Convention has now been in continuous session, with recesses only, since Dec. 8, 1932. Congress, when established, will consist probably of a Senate of 35 members and a House of Deputies of 110 members, elected for four years and changing in whole or by halves, with the President, on Dec. 8, 1935.

The Civil Code in force is still that of 1851-2; but a new project, embodying many of the newest features of the German and Swiss Codes, was completed by a Commission in 1930, and may be taken up for consideration and serious discussion as soon as the country finds itself a little more stable. With the Code of Commerce, of 1902, it is supplemented for actual operation by the Code of Civil Procedure of 1912; but the real course of civil suits is subject to excessive delays which are the talk of lawyers and laymen alike, and must bring some real relief when matters of peace time culture can again engross general attention. The Penal Code, prepared, largely by Dr. Victor Maurtua, now in Washington as special Envoy, from the Italian Code, and enacted in 1924, has to be operated under the Code of Criminal Procedure of 1920, which naturally does not fully implement and support many of the later provisions. Labor legislation dating from about 1916 includes Workmen's Compensation, for employers of over 30 persons, under insurance in registered and inspected companies, or in the alternative by a fund of the employers' own establishing; fines for violation of the provisions of the law are imposed by the Labor Department of the Government, but suits concerning the application of the funds and payment in specific cases go into the ordinary civil courts, as Peru is one of the unusual civil law countries that maintains no separate administrative tribunals. Divorce has been allowed since 1931, substantially as under a law passed a long time before, but vetoed and held inoperative for more than six years by the preceding regime. Summary "executory" proceedings on negotiable instruments and other documents duly authenticated are permitted by the Code of Civil Procedure, resulting in a real final judgment in about six months, if all details are in order, and preceded when desired by a "preventive" and then "definitive" embargo (attachment), so that such suits are worth while, on proper occasion, and may be said to offer the best hope of really profitable ultimate success.

Civil suits may and generally do run through two appeals, from the Court of First Instance in which they are begun through the Superior Courts, of five judges in each session, and corresponding roughly to each of the 21 Departments, divided further into 104 Provinces, to the Supreme Court, sitting in two Sessions of five Judges each, in Lima, from March 18 to January 14 of each year. Criminal matters of a petty nature are disposed of by the Prefects of each Province or the Sub-Prefects of smaller Districts; and more serious crimes, after a Summary only, without any judgment, by the primary Judge of Instruction, are decided by the Correctional Courts, corresponding to and composed by semi-annual re-assignment of the same Judges as the Superior (civil) Courts, of second instance. Appeal from the decision is allowed to either the Prosecutor or the defense; but if the Correctional Court acquits the accused, he is set

*This is the third of a series of articles on South American Current Practices. The first appeared in the April issue and the second in the May issue of the JOURNAL. Mr. Ireland is now making an extended trip in South America.

at liberty at once, and should the Fiscal win in the Supreme Court on appeal, the police have to find the defendant again, if they can, for retrial. There is in the ordinary criminal procedure no death penalty, the maximum punishment being "internment" for 25 years; but in the Military Penal Code treason against the State is punishable by death. Participants in armed insurrections come under the military jurisdiction; by this provision some of the private sailors in the recent naval revolt were shot, and it is possible that the same fate awaits the officers, just now being court-martialed, of the 11th Regiment which rose unsuccessfully at Cajamarca on March 11th.

The Presidents of several of the Courts, in their customary addresses at the annual reopening of the sessions on March 18th, stressed the need for improvement in the hastening of the preliminary incidents and final decision in civil cases, and the desirability of returning to the former practice of allowing the Judge of Instruction to make the first decision for all but the most serious offenses, so that the Correctional Courts should only approve or reverse his sentence, instead of making the original determination themselves, as now. Besides the resumption of the publication of selected jurisprudence in official reports, and the payment of judicial retirement pensions, for which sufficient money has recently been lacking, there was mentioned also for action in better economic days, the agitation for the appointment and payment by the State of regular Court Clerks or Secretaries, and the abolition of the present system, evidently in the main a survival from Spanish Colonial days, of State Official Writers (Escribanos), who take instructions from the Judge for every paper, citation, order or entry in each suit, but are paid by the page by the party in whose behalf the writing is done: a system of such tremendous expense and so subject to abuse in a multitude of ways that it may be said to be almost incompatible with the principle that justice shall be free.

Santa Clara, March, 1933.

The Movement for Bar Integration

During the past year there have been numerous instances of efforts to induce the bar to accept half-size juries, or none at all, because of lack of public funds. The substitution of a bench of three has been often proposed, but never anywhere actually used. Oklahoma now comes to the fore with a new plan which eliminates jury expenses and is said to work well. At Seminole, Judge C. Guy Cutlip, wishing to reduce expense and save time, adopted the original plan of asking two members of the local bar to sit with him in all cases in which the parties were disposed to waive jury trial. The lawyers have cooperated, without pay, and are said to appreciate the experience, which adds zest to their work. The choice of advisers is subject to the approval of litigants. They are then sworn and after due deliberation, following Judge Cutlip's suggestions as to his view of the law applicable to the facts in the case, they retire, consult, and render a written opinion. It is reported that the local bar is unanimous in endorsement of this plan. It permits of saving considerable time as against the usual jury trial. It is believed that next year money will be available to pay the assistants to the court. It is said finally that the lawyers enjoy seeing cases from the viewpoint of the bench and profit by observing errors in trial methods which their colleagues make.

The California State Bar has gone farther in formulating principles for judicial selection than the bar of any other state. Last year, a favorable vote by referendum having been had, the governors created a committee to formulate a plan adapted to the more populous counties, and to endeavor to secure action by the legislature looking to amendment of the constitution. The committee agreed, after much discussion, upon this plan: nominations to be by a commission comprising the chief justice of the state, the presiding justice of the senior division of the appellate court of the district and the state senator representing the county; appointment to be by the governor; all appointments, whether regular or interim, to be for four years and until the next general election. An incumbent desiring reelection files a certificate and his name goes on the ballot with no competing name. In the case of any candidate not elected an appointment is made by the governor from the list submitted by the commission, for the full term.

The plan so formulated was submitted to the bar of the state on a referendum and the vote stood 3,342 in favor, and 1,252 against.

The committee met with great success in the legislature, but the plan was made applicable only to Los Angeles County, instead of to all counties having more than 200,000 population, as first proposed.

The voters of the state will have a chance to so amend the constitution, and if this is done the people of Los Angeles County will be able to determine, at an election, whether they wish to try the experiment. In that county eighty judges are elected, all for short terms.

After about two years of negotiation the Utah State Bar has reached a satisfactory solution of the controversy between the bar and the bankers. The latter, through its Trust Section, created a committee to confer with a committee representing the board of governors of the Utah State Bar. An agreement was worked out and accepted mutually. Its most important feature, probably, is that a standing committee will be appointed by each party to receive complaints regarding practices by the other party, to investigate, and to take appropriate steps to have them discontinued. Recognizing the fact that no written agreement could be made to cover every possible exigency, these committees are provided as a means for promoting good faith and good practices and to afford means for conciliation of disputes. The Utah State Bar board believes that it has reached the best solution of the problems involved.

A committee of the Minnesota State Bar Association, of which Mr. Stanley B. Houck is chairman, will report to the Association at its July meeting concerning the matter of state bar integration. Before the next annual meeting of the Florida State Bar Association a similar study will be made under the direction of President Giles J. Patterson.

In New Mexico a recent act of legislature conferred full rule-making authority on the supreme court and declared that "all statutes relating to pleading, practice and procedure, now existing, shall, from and after the passage of this

act, have force and effect only as rules of court and shall remain in force unless and until modified or suspended by rules promulgated pursuant hereto." Chief Justice John C. Watson, on the taking effect of the act, addressed a letter to the district court judges and the State Bar commissioners informing them of the court's intention to create a bar committee to aid the court in a study of existing procedure. The commissioners are requested to effect some organization of the bar in their several districts with a view to making concrete recommendations for changes, after full discussion. New Mexico has no judicial council but the organization so constructed will enable both bench and bar to formulate studied opinions as to the state's needs. New Mexico is in the fortunate situation of having full responsibility centered upon its lawyers for the administration of justice under the constitution and the substantive law. With this organization and these powers the lawyers and judges should be able to reach their ideals as to judicial administration and then exert a powerful influence in respect to legislation affecting private law.

In Wisconsin the Rules Committee has been devoting a great deal of work to the very large task of co-ordinating the procedural law, which consists of a body of statutes, former rules of court, and the new body of rules established under the authority conferred by the legislature on the supreme court. The result of this work will be primarily a conveniently arranged volume of pleading, practice and procedure, all under the aegis of the high court, one comparable with the Wisconsin statute book, which has served as a model for all states which have wished to reduce the statutes to an orderly system, brought up to date after every legislative session. The Rules Committee, based upon the English Supreme Court plan, comprises the attorney general, the chairmen of the house and senate judiciary committees, the revisor of statutes, a member each of the Boards of Circuit and County Judges, the president of the State Bar Association and three other members thereof.

The Nevada State Bar expects to create a fund for the aid of indigent and aged lawyers when conditions permit. This is said to be a "moral duty." For a good many years the Illinois State Bar Association has been building up such a pension fund. The time will doubtless come when the bar in every state will look upon this as routine practice. We have yet to match the work of the provincial bars in Canada in respect to library facilities for lawyers at every county seat.

After passage of the Arizona State Bar act petitions were circulated for the purpose of initiating a referendum vote. This movement apparently failed and on June 1st preparations were under way for giving effect to the act. Chief Justice Ross was to appoint four commissioners in the middle of June who, with himself, would initiate organization. The Arizona act offers a good instance of the problem of the judge as a part of the State Bar. It makes judges of the supreme and superior courts and of the United States district court honorary members, who pay no dues and have no votes, but shall have such privileges as the governors may provide. Upon retirement a judge becomes an active member.

State and Local Bar Association News

Miles N. Pike was elected President of the Washoe County (Nev.) Bar Association, at a recent meeting of that organization. Other officers elected include C. L. Richards, First Vice-President; William Forman, Jr., Second Vice-President; Sidney Robinson, Secretary, and Leon Shore, Treasurer.

The Eighteenth Judicial District (Minn.) Bar Association at its meeting in May chose the following new officers for the ensuing year: Frank T. White, Elk River, President; E. L. Jorgensen, Anoka, Vice-President; Robert B. Gillespie, Cambridge, Secretary; F. H. Lindsley, Delano, Treasurer; George H. Tyler, Elk River, and Henry L. Soderquist, Cambridge, members of the Board of Governors.

Ben W. Palmer, of Minneapolis, was elected President of the Hennepin County (Minn.) Bar Association at a recent meeting. A. L. Dretchko was elected Vice-President, Thomas Vennum was re-elected Secretary and William W. Gibson was named Secretary.

The Louisville (Ky.) Bar Association at its recent annual meeting chose as President for the next year Thomas A. Barker. Other officers chosen are First Vice-President, William F. Clarke, Jr.; Second Vice-President, George A. Hendon, Jr.; Treasurer, Gavin H. Cochran (re-elected), and Secretary, John K. Skaggs, Jr. (re-elected).

The Annual meeting of the First District (Minn.) Bar Association was held in Hastings the early part of May. The election of officers resulted in the selection of Judge Charles P. Hall, of Red Wing, as President; A. E. Rietz, Farmington, Vice-President; Clinton H. Bentley, Red Wing, Secretary; Fred A. Curtis, South St. Paul, Treasurer; D. L. Grannis, South St. Paul, Governor on State Board.

Members of the San Luis Valley (Col.) Bar Association met at Del Norte on May 8th and elected the following officers for the ensuing year: George M. Corlett, Monte Vista, President; E. H. Ellithorp, Alamosa, Vice-President; Ralph C. Ellithorpe, Del Norte, Secretary-Treasurer.

The Boulder County (Col.) Bar Association, at its annual meeting in April, elected new officers as follows: Harold Martin, Boulder, President; Lyman P. Weld, Longmont, Vice-President; Rudolph Johnson, Boulder, Secretary, and S. Park Kinney, Boulder, Treasurer.

Fred L. Gross was re-elected to his fourth term as President of the Brooklyn (N. Y.) Bar Association on May 12th. Other officers re-elected were Edward H. Wilson, first Vice-President; Assistant District Attorney Ralph K. Jacobs, Second Vice-President, former County Judge William R. Bayes, Third Vice-President; Edward J. Connolly, Secretary, and Edwin L. Snedeker, Treasurer.

F. L. Ballou, of Fairmont was elected President of the Seventeenth Judicial District (Minn.) Bar Association at the recent annual meeting of that Association. R. H. Putnam, of Blue Earth, was named Treasurer, and L. J. Seifert, Fairmont, Secretary.

At the annual meeting of the Minneapolis (Minn.) Bar Association held in May, Edward Nelson was re-elected President, Paul Thompson, Vice-President, and S. D. Klapp, Secretary-Treasurer, were also re-elected. The following were named to the Executive Committee: Lee B. Byard, Edward J. Lee, Charles E. Purdy, George B. Leonard and Howard Quealey.

OFFICIAL DIRECTORY, 1932-1933

President

Clarence E. Martin.....Martinsburg, W. Va.
Peoples Trust Building

Secretary

William P. MacCracken, Jr..... Washington, D. C.
National Press Bldg.,

Assistant Secretary

Richard Bentley.....Chicago, Ill.
209 So. La Salle St.

Executive Secretary

Olive G. Ricker.....Chicago, Ill.
1140 North Dearborn St.

Treasurer

John H. Voorhees.....Sioux Falls, S. D.
Treasurer's office, 1140 North Dearborn St.....Chicago, Ill.

Executive Committee

Guy. A. Thompson (Ex. Of.).....St. Louis, Mo.
George H. Smith (Ex. Of.).....Salt Lake City, Utah.
Edgar B. Tolman (Ex. Of.).....Chicago, Ill.
Jefferson P. Chandler.....Los Angeles, Calif.
Scott M. Loftin.....Jacksonville, Fla.
James R. Keaton.....Oklahoma City, Okla.
Harry S. Knight.....Sunbury, Pa.
Walter P. Armstrong.....Memphis, Tenn.
Glenn J. Fairbrook.....Seattle, Wash.
Joseph F. O'Connell.....Boston, Mass.
A. L. Scott.....Pioche, Nev.
William L. Ransom.....New York, N. Y.

Vice-Presidents

Leslie P. Snow, First U. S. Judicial Circuit..Rochester, N. H.
George E. Beers, Second Circuit.....New Haven, Conn.
J. Harry LaBrum, Third Circuit.....Philadelphia, Pa.
Morris A. Soper, Fourth Circuit.....Baltimore, Md.
James A. Baker, Fifth Circuit.....Houston, Tex.
Oscar C. Hull, Sixth Circuit.....Detroit, Mich.
Louis A. Lecher, Seventh Circuit.....Milwaukee, Wis.
Jesse A. Miller, Eighth Circuit.....Des Moines, Iowa
Charles A. Beardsley, Ninth Circuit.....Oakland, Calif.
Orie L. Phillips, Tenth Circuit.....Albuquerque, N. M.

General Council

Alabama—Birmingham.....William Logan Martin
Alaska—Valdez.....Anthony J. Dimond
Arizona—Phoenix.....Barnett E. Marks
Arkansas—Texarkana.....W. H. Arnold
California—Los Angeles.....Thomas C. Ridgway
Canal Zone—Ancon.....James J. Lenihan
Colorado—Antonito.....Ralph L. Carr
Connecticut—Branford.....Ernest L. Averill
Delaware—Wilmington.....Charles F. Curley
Dist. of Columbia—Washington.....George Maurice Morris
Florida—Tampa.....T. M. Shackleford, Jr.
Georgia—Savannah.....David S. Atkinson
Idaho—Coeur d'Alene.....James F. Ailshie
Illinois—Chicago.....Edward W. Everett
Indiana—Indianapolis.....James M. Ogden
Iowa—Sioux City.....Henry C. Shull
Kansas—Topeka.....Robert Stone
Kentucky—Catlettsburg.....John L. Smith
Louisiana—New Orleans.....Burt W. Henry
Maine—Portland.....Clement F. Robinson
Maryland—Towson.....T. Scott Offutt
Massachusetts—Boston.....Francis J. Carney
Michigan—Detroit.....Carl V. Essery
Minnesota—Minneapolis.....Charles R. Fowler
Mississippi—Jackson.....L. Barrett Jones
Missouri—St. Louis.....Jacob M. Lashly
Montana—Butte.....Dan M. Kelly
Nebraska—Omaha.....Harvey M. Johnsen
Nevada—Reno.....Robert M. Price
New Hampshire—Manchester.....Louis E. Wyman
New Jersey—Newark.....Arthur T. Vanderbilt
New Mexico—Albuquerque.....George S. Klock
New York—Syracuse.....George H. Bond
North Carolina—Winston-Salem.....William M. Hendren
North Dakota—Fargo.....Melvin A. Hildreth
Ohio—Cincinnati.....Murray M. Shoemaker
Oklahoma—Tulsa.....George S. Ramsey
Oregon—Portland.....Sidney Teiser
Pennsylvania—Lancaster.....Bernard J. Myers
Philippine Islands—Manila.....John W. Haussermann
Puerto Rico—San Juan.....Charles E. Winter
Rhode Island—Providence.....James C. Collins
South Carolina—Charleston.....George L. Buist
South Dakota—Huron.....Lewis Benson
Tennessee—Memphis.....Walter Chandler
Texas—Dallas.....Harry P. Lawther
Utah—Salt Lake City.....Chairman, George H. Smith
Vermont—Morrisville.....George M. Powers
Virginia—Suffolk.....James H. Corbitt
Washington—Seattle.....Cassius E. Gates
West Virginia—Huntington.....Douglas W. Brown
Wisconsin—Milwaukee.....Frank T. Boesel
Wyoming—Cheyenne.....Charles E. Lane

Comparative Law Bureau

Honorary Chairman, William W. Smithers..Philadelphia, Pa.
Chairman, Charles S. Lobingier.....Washington, D. C.
Vice-Chairman, Phanor J. Eder.....New York, N. Y.
Secretary, Robert P. Shick.....Philadelphia, Pa.
Treasurer, J. E. Sebree.....Washington, D. C.
Council: Frederick K. Beutel, New Orleans, La.; Frederick C. Fisher, Carlotta, Cal.; Roscoe Pound, Cambridge, Mass.; John T. Vance, Washington, D. C.; H. Milton Colvin, New Orleans, La.; John H. Wigmore, Chicago, Ill.; Henry D. Williams, New York City, N. Y.; H. Winship Wheatley, Washington, D. C.

Conference of Bar Association Delegates

Chairman, David A. Simmons.....Houston, Tex.
Vice-Chairman, Robert H. Jackson.....Jamestown, N. Y.
Secretary, Herbert Harley.....Ann Arbor, Mich.
Council: Elihu Root, Honorary Member, New York City; Philip J. Wickser, Buffalo, N. Y.; Charles E. Clark, New Haven, Conn.; Royal A. Stone, St. Paul, Minn.; Oscar C. Hull, Detroit, Mich.; Frank W. Grinnell, Boston, Mass.; Charles A. Beardsley, Oakland, Calif.; Robert P. Shick, Philadelphia, Pa.; Morris B. Mitchell, Minneapolis, Minn.; Henry Upson Sims, Birmingham, Ala.

Section of Criminal Law and Criminology

Chairman, Justin Miller.....Durham, N. C.
Vice-Chairman, Rollin M. Perkins.....Iowa City, Ia.
Secretary, Henry W. Toll.....Denver, Colo.
Council: Lester D. Summerfield, Reno, Nev.; George A. Bowman, Milwaukee, Wis.; Oscar Hallam, St. Paul, Minn.; Edgar W. Camp, Los Angeles, Calif.; Sanford Bates, Washington, D. C.; James J. Robinson, Bloomington, Ind.; Thomas S. Rice, Brooklyn, N. Y.; Louis S. Cohane, Detroit, Mich.

Judicial Section

Chairman, John M. Grimm.....Cedar Rapids, Ia.
Vice-Chairman, Edward R. Finch.....New York, N. Y.
Secretary, Charles F. Close.....Cleveland, Ohio
Council: William I. Schaffer, Philadelphia, Pa.; Jesse C. Adkins, Washington, D. C.; James W. McClendon, Austin, Texas; John J. Parker, Charlotte, N. C.; George W. McClintic, Charleston, W. Va.; Charles A. Goss, Lincoln, Neb.; George M. Powers, Morrisville, Vt.

Section of Legal Education and Admission to the Bar

Chairman, John Kirkland Clark.....New York, N. Y.
Vice-Chairman, Oscar Hallam.....St. Paul, Minn.
Secretary, Alexander B. Andrews.....Raleigh, N. C.
Council: Theodore F. Green, Providence, R. I.; James E. Brenner, Palo Alto, Calif.; James Grafton Rogers, Washington, D. C.; C. E. Dunbar, Jr., New Orleans, La.; William A. Hayes, Milwaukee, Wis.; W. E. Stanley, Wichita, Kan.; D. Lawrence Groner, Washington, D. C.; R. Allan Stephens, Springfield, Ill.

Section of Mineral Law

Chairman, D. J. F. Strother.....Welch, W. Va.
Vice-Chairman, James W. Finley.....Bartlesville, Okla.
Secretary, Peter Q. Nyce.....Washington, D. C.
Council: James A. Veasey, Tulsa, Okla.; John H. Kane, Bartlesville, Okla.; P. C. Spencer, Independence, Kan.; D. M. Kelly, Butte, Mont.; A. V. Andrews, Los Angeles, Cal.; J. L. Shepherd, Houston, Tex.; Francis C. Wilson, Santa Fe, N. M.

Section of Patent, Trademark and Copyright Law

Chairman, Jo. Baily Brown.....Pittsburgh, Pa.
Vice-Chairman, George L. Wilkinson.....Chicago, Ill.
Secretary, Henry E. Stauffer.....Washington, D. C.
Council: The Officers ex-officio and Henry D. Williams, New York City, N. Y.; Henry M. Huxley, Chicago, Ill.; Charles H. Howson, Philadelphia, Pa.; James T. Newton, Washington, D. C.; Charles L. Sturtevant, Washington, D. C.; Karl Fenning, Washington, D. C.; Bert M. Kent, Cleveland, Ohio; Nathan Heard, Boston, Mass.

Section of Public Utility Law

Chairman, Lovick P. Miles.....Memphis, Tenn.
Vice-Chairman, Henry G. Wells.....Haverhill, Mass.
Secretary, Carl D. Jackson.....New York, N. Y.
Council: Frank A. Reid, New York City, N. Y.; Nathaniel T. Guernsey, New York City, N. Y.; David E. Lilienthal, Madison, Wis.; Milton Smith, Jr., Denver, Colo.; George Roberts, New York City, N. Y.; George R. Grant, Boston, Mass.; T. W. Davis, Wilmington, N. C.; Harry J. Dunbaugh, Chicago, Ill.